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In the Supreme Court

OF THE

United States

October Term, 1923

No. 284

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, (a Corporation),
Respondent.

Certiorari to the Supreme Court of the State of California

BRIEF FOR RESPONDENT, ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY.

STATEMENT OF THE CASE

Writs of certiorari have been granted upon the petition of the Railroad Commission of the State of California, directed to the Supreme Court of that State, to review a decision rendered by the Supreme Court of the State of California, wherein the state court annulled orders entered by the Rail-

road Commission of the State of California requiring the Atchison, Topeka & Santa Fe Railway Company, Los Angeles & Salt Lake Railroad Company, Southern Pacific Company, and Southern Pacific Railroad Company to "make and construct * * * additions, *extensions*,* improvements to, and changes in, their railroad facilities in the City of Los Angeles, and to erect a union passenger station and buildings incidental thereto in said City of Los Angeles" at a designated site remote from the existing passenger stations of respondents; "and perform such work and make and construct the necessary fills, cuts, viaducts and other works and structures necessary for a separation of grades at" certain specified crossings. (Original Order, Tr. 104, 105).

The Commission's orders further provided that Southern Pacific Company should "eliminate all main line traffic from Alameda Street" for a distance of about three miles, over which thirty-nine trains carrying interstate passengers are operated each twenty-four hours.

The Commission's orders will require the Atchison, Topeka & Santa Fe Railway Company, the Los Angeles & Salt Lake Railroad Company, Southern Pacific Company, and Southern Pacific Railroad Company, to *abandon* their existing passenger

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* (Italics are ours unless otherwise noted.)

(We will refer to petitioner's brief filed in support of the petition for writ as "Brief for Petitioner" and to the second brief filed as "Supplemental Brief.")

station facilities in the City of Los Angeles, including the modern passenger station of the Southern Pacific Company, erected in 1915 under plans and specifications approved by the California Railroad Commission by formal order, although the uncontradicted evidence shows that the existing passenger terminal facilities of the Southern Pacific Company are adequate to accommodate all passenger traffic of the three steam lines for at least a period of twenty years and that properties owned by the Santa Fe "offer a suitable location for a union passenger terminal" and the Los Angeles & Salt Lake Railroad Company owns ample property to provide all necessary facilities in handling their passenger traffic.

As is stated by counsel for petitioners in their petition for writ of certiorari, "the relief asked by the various complaints (before the Commission) *included a general investigation of the whole railroad and terminal situation*" (pp. 3, 4).

The orders require the carriers to "proceed to the procurement of sufficient ground within the boundaries hereinafter set out, and proceed with the construction of an adequate union passenger station thereon and buildings incidental thereto in the City of Los Angeles, and to make such *additions to, extensions of,* improvements and changes in the existing railroad facilities of said companies as may be reasonable, necessary and incidental to the use of said union passenger station." (Tr. 146.)

It is conceded by counsel for petitioners in their brief (pp. 17 and 18) that in order to carry the Commission's orders into effect the carriers would be obliged to make *extensions of their main lines* to reach the proposed site of the union depot or to effect some arrangement for the *joint use of tracks* and that "the erection of a new union depot and the elimination of grade crossings will require a rearrangement of traffic. Some new track may have to be laid and some old track abandoned." (Petitioner's Brief p. 21.)

To carry the Commission's orders into effect the carriers would be required to expend a sum estimated as low as $25,396,633 and as high as $45,092,104. (Tr. 94.)

REVIEW BY STATE SUPREME COURT

The Commission's orders becoming final, each of the carriers thereupon filed in the Supreme Court of the State of California a petition for writ of review in conformity with the provisions of Section 67 of the Public Utilities Act of the State of California (Tr. 169, 185, 190), alleging that the lines of railroad owned and operated by it formed a component, integral and essential part of an interstate system of steam railroads and are operated as a unit as an interstate system for the transportation of freight and passengers in interstate and intrastate commerce, and drawing in question the validity of the California statute upon

which the Railroad Commission had predicated their orders and the authority exercised under these statutes upon the ground that the state statute and the authority sought to be exercised was repugnant to the Constitution and laws of the United States.

The grounds upon which these petitions were rested, briefly stated, are:

That the decisions and orders of the Railroad Commission of the State of California are beyond the power and jurisdiction of that Commission and are in contravention of and repugnant to Section 8 of Article I of the Constitution of the United States; and of Subdivision 15 of Section 1 of the Act of the Congress of the United States generally known as the Interstate Commerce Act, approved February 4, 1887, as amended; and of Subdivisions 18 to 22, inclusive, of the same section; and of Subdivision 4 of Section 3 of said Act as amended; and of Subdivision 4 of Section 5 of said act as amended; and of Subdivisions 2 and 3 of Section 15-A of said Act, as amended, which section was added to said Act by the Transportation Act of 1920; and of Subdivision 2 of Section 20-A of said Interstate Commerce Act, as amended, and particularly as amended by said Transportation Act.

That the Railroad Commission of the State of California has no jurisdiction to require the respondents to comply with said orders for the

reason that the necessary force and effect of such orders is to require the joint use of terminal facilities owned by the several carriers which are used by them in the conduct of their business by one or more of the other carriers, and to require the joint use of main track or tracks of each of the carriers for a distance outside of its terminal, both by the owner and one or more of the other carriers, whereas at the time the Commission's orders and decisions were rendered power and authority to require the use of terminal facilities, including main line track or tracks for a reasonable distance outside the terminals, by any other carrier or carriers, was vested solely in the Interstate Commerce Commission by the provisions of Paragraph 4 of Section 3, and Paragraph 15 of Section 1 of the Interstate Commerce Act, as amended in 1920.

That the California Railroad Commission has no jurisdiction to require the Respondents to comply with the provisions of the orders for the reason that the necessary force and effect of the orders so entered is to require each of the carriers to undertake the abandonment and extension of its lines of railroad and the construction of a new line of railroad and facilities, and the operation thereof under said extensions, and the joint use of such extensions and new line by each of the carriers and the other carriers involved in the order, whereas at the time said decisions and orders were entered no such extension

of lines or construction of new line could be undertaken by the carriers until there had been obtained from the Interstate Commerce Commission a certificate under the provisions of paragraphs 18 to 22, inclusive, of Section 1 of the Interstate Commerce Act, as amended, permitting the carriers to make such extension, and that the orders of the California Commission, therefore, invade the authority and jurisdiction of the Interstate Commerce Commission and are in contravention of and repugnant to Section 8 of Article I of the Constitution of the United States.

That the Railroad Commission of the State of California had no jurisdiction or power to make or enter its orders because, in order to comply therewith, the carriers are required to make expenditures of great and unreasonable sums out of proportion to any benefits to be derived therefrom by the carriers or their passengers, or the public generally, and the necessary effect of the orders will be to require each of the carriers to expend sums which could only be obtained by the issuance of securities under the authority and supervision of the Interstate Commerce Commission as provided by Section 20-A of the Interstate Commerce Act, and that, therefore, the power sought to be exercised by the State Commission is in contravention of the Interstate Commerce Act and Section 8 of Article I of the Constitution of the United States.

That the Commission's decisions and orders are in contravention of and repugnant to the provisions of Section 1 of the Fourteenth Amendment of the Constitution of the United States for the reason that the necessary effect of said orders is to require the railroads to share the use of the passenger terminal facilities owned and operated by them respectively in the City of Los Angeles, together with their main track or tracks for a reasonable distance beyond their terminals, with the other carriers named in the decisions and orders, without compensation for the damages which the railroads will necessarily sustain.

That the Commission's decisions and orders were in contravention of and repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States by reason of the fact that respondents were by said decisions and orders denied the equal protection of the laws and deprived of their property without due process of law for the reason that no evidence was introduced before said Commission to the effect that the passenger terminal facilities owned and operated by carriers respectively in the City of Los Angeles are inadequate to meet the public convenience and necessity.

That the Commission's decisions and orders are repugnant to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States by reason of the fact that the uncontradicted evidence introduced before said Com-

mission shows that the present facilities and passenger station of Southern Pacific Company and Southern Pacific Railroad Company are adequate to accommodate all passenger traffic of respondents within said City of Los Angeles and in addition thereto to accommodate all the passenger traffic of the other steam line carriers named in said decisions and orders, not only at the present time, but for at least a period of twenty years from the present time, and, therefore, public convenience, necessity and safety do not require these companies to abandon the passenger facilities owned and operated by them, and join the other carriers named in said decisions and orders in the expense of constructing a union passenger station and buildings incidental thereto at the site specified by said Commission in its said decisions and orders.

The Southern Pacific Company and Southern Pacific Railroad Company also contended that the Commission's decisions and orders are in contravention of and repugnant to the provisions of Section 10 of Article I of the Constitution of the United States and of the Fourteenth Amendment to the Constitution of the United States by reason of the fact that these decisions and orders will, if made effective, impair the contract made between the State of California and Southern Pacific Railroad Company, and the contract made and entered into between the City of Los Angeles and petitioner Southern Pacific Railroad Company,

granting a franchise authorizing the construction and operation of its railroad on and along Alameda Street in the City of Los Angeles.

DECISION OF THE SUPREME COURT OF THE STATE OF CALIFORNIA

The state court by unanimous opinion sustained the constitutional rights asserted by the carriers and decided in their favor upon the sole ground that the state statute was repugnant to the Federal statute, and concluded "that full power and authority over the matter of union terminal depot facilities of the railroads who are largely engaged in interstate commerce, and who are the petitioners herein, has been vested in the Interstate Commerce Commission under the terms of said amendatory act of 1920, and that by virtue thereof the Railroad Commission of California, one of the respondents herein, has been divested of the power, authority and jurisdiction over that subject, sought by it to be exercised in the several proceedings before it and by the order presented for review herein." (Tr. 233.)

The state court further held that the question decided by it made it unnecessary to decide the other questions raised by the carriers in their petitions for writ of review, all of which were separable and related to the denial of rights in violation of the Federal Constitution.

The three petitions for writs of certiorari filed in this court relate solely to the question of the respective jurisdiction of the Federal and State Commissions. (Petitions, pp. 8, 9.)

Consolidation of Cases

In view of the fact that the several proceedings before the Railroad Commission, including the application made by the carriers and the order for a general investigation, were consolidated by an order of the Commission and treated as one proceeding, and, as was stated by counsel for petitioners, "the three proceedings (instituted in the state court) raised almost identical questions and could be treated by the State Supreme Court as one case" and for the purpose of economizing time and effort the respondents in the three cases pending before this court will file in each case an identical brief.

ARGUMENT.

SCOPE OF REVIEW BY THIS COURT

Counsel for petitioner have set forth in their brief at page 5 that it has been deemed proper to submit a supplemental stipulated record containing such transcript of evidence as is necessary to enable this court to determine all the points raised by respondents in their petitions for writs of review addressed to the state court. Counsel for all parties have joined in stipulating the supplemental transcript and exhibits into the record filed in this court in order that this court may determine all points raised in the Supreme Court of the state in the event this court concludes to decide these questions.

Counsel for respondents will later undertake to reply to the arguments relating to these other points which have been argued by counsel for petitioner in their brief, but nevertheless we hold it our duty to respectfully suggest the reasons why this court in these proceedings should not undertake to review any question other than that decided by the state court.

We were at first inclined to accept the conclusions which counsel for petitioner reached by relying upon the cases cited at page 5 of their brief but examination of these cases discloses that in the first three cases cited (*Southern Railway Company et al. v. Watts; Atlantic Coast Line R. R. v. Daughton; Greene v. L. & I. R. Co.*) the Supreme

Court of the United States was reviewing decisions rendered by inferior Federal courts and that the last case cited by petitioner's counsel *(Appleby v. Buffalo)* is not apposite as the case is authority only for the rule that "the right of this court to review the judgment of the highest court of the state is specifically limited by Section 709, Revised Statutes, and in cases such as this depends upon an alleged denial of a Federal right which the record shows was specifically set up and claimed in and denied by the state court, or that such was the necessary effect of the judgment."

A diligent examination of the authorities has failed to disclose any case similar to the case at bar. In practically all cases where this question has been raised it appears that there was a Federal question upon which the jurisdiction of this court was invoked and also questions relating to local or state law, whereas in the case at bar the respondents petitioned the state court for a writ of review of the Commission's orders upon several grounds, drawing in question the validity of the California statute and the authority exercised by that state through its Railroad Commission on the ground of their being repugnant to the Constitution and laws of the United States. (Paragraphs 9, 10, 11, 12, 13, 14, 15, petition for writ of review of Southern Pacific Company and Southern Pacific Railroad Company (Tr. 176-182);

paragraph 2, petition for writ of review of the Atchison, Topeka & Santa Fe Railway Company (Tr. 186); paragraph 3, petition of Los Angeles & Salt Lake Railroad Company (Tr. 192).)

The State Supreme Court rested its decision and judgment in each of respondents' petitions upon the relative and respective jurisdictions of the Interstate Commerce Commission and the Railroad Commission of the State of California (Tr. 233). The State Court further held that the disposition of the question decided rendered unnecessary a discussion of the other questions which had been raised by the respondents in the petitions filed in the State Court. (Tr. 233-4.)

The petitions for writs of certiorari filed in the instant cases are addressed entirely to a review of the one question decided by the State Supreme Court and the original brief filed in support of the petition for the writ of certiorari relates exclusively to this one question.

The question whether all the grounds relied upon by the respondents in their petitions for review filed in the State Court should be reviewed by this Court in this proceeding would be easy of solution in the event all other grounds urged upon the State Court for writs of review had related to local or state law for the reason that this question is set at rest by a long line of harmonious decisions ren-

dered by this Court under the Acts of 1789 and 1867 and Section 237 of the Judicial Code.

But the facts in these cases are peculiar in that all the grounds upon which the carriers relied in seeking writs of review from the State Court were, as is shown by the petitions for writs of review, of a Federal nature.

We have reached the conclusion that the authorities hereinafter cited sustain the rule that on a hearing of a writ of certiorari or a writ of error addressed to "the highest court of the state" under the provisions of Section 237 of the Judicial Code this Court, in considering the questions presented, will confine itself to a consideration only of such *Federal* questions as have been *decided* by the highest court of the State.

> *Murdock v. City of Memphis*, 20 Wall. 590 (87 U. S.).

See also *Railroad Co. v. Maryland*, 20 Wall. 643, 645.

The two cases last cited, as well as many cases hereinafter cited, were, it is true, made under the provisions of the Federal Judiciary Act which has been superseded by Section 237 of the Judicial Code, but they are nevertheless applicable in view of the similarity of the provisions of the statutes then and now in force.

"The jurisdiction of this court to review the proceedings of the state courts, as we have had frequent occasion to declare, is not that of a general reviewing court in error, but is limited to the specific instances of *denials* of Federal rights, whether those pertaining to the constitutionality of Federal or State statutes, or to certain rights, immunities and privileges of Federal origin, specially set up in the State Court and *denied* by the rulings and judgment of that court. * * *"

Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 97.

St. Louis, etc., v. Taylor, 210 U. S. 267.

Seaboard Air Line Ry. v. Duvall, 225 U. S. 477, 487.

Keokuk & Hamilton Bridge Co. v. Illinois, 175 U. S. 633-4.

Harding v. Illinois, 196 U. S. 78, 85-6

Eustis v. Bolles, 150 U. S. 361, 366.

In support of our contention that this Court will confine its attention only in its examination of the questions arising in connection with the writ of certiorari to the points or questions covered by the petitioner's assignment of errors as to which review is prayed, we direct the Court's attention to the case of *Alice State Bank v. Houston Passenger Company*, 247 U. S. 240, which was a case of certiorari to the Federal Circuit Court of Appeals. It was there held:

"Upon a review by certiorari, the court confines its discussion to the matter relied on in procuring the writ."

At page 242, when referring to a contention which might have been made for a reversal of the judgment, the Court said:

> "But as that is not the ground upon which the writ of certiorari was asked or granted, we confine our discussion to the matter relied upon in asking the intervention of this Court," citing *Hubbard v. Tod*, 171 U. S. 474, 494.

We can conceive of no reason why the rules announced in these cases are not equally applicable in a case where writs of error or certiorari have been directed to a State court.

It appears from the foregoing authorities that where this court has only determined the question decided by the State Court it has remanded the case to the State Court where reversal is ordered, with instructions to the State Court for further proceedings not inconsistent with the opinion of this court.

Kinzell v. C. M. & St. P. Ry. Co., 250 U. S. 130.

Coe v. Armour Fertilizer Works, 237 U. S. 413.

Upon cases being so remanded by this Court to the highest courts of the States, the State Courts will proceed to determine the questions which were not originally adjudicated by them.

Kinzell v. C. M. & St. P. Ry. Co., 190 Pac. 255.

Ettor v. City of Tacoma, 77 Wash. 267, 137 Pac. 120.

Gibson v. Chouteau, 50 Mo. 85.

Goodtitle v. Kibbe, 1 Ala. 403.

Simonson v. Monson, 36 S. D. 245, 153 N. W. 1020.

Harding v. Harding, 148 Cal. 397.

The authorities cited warrant the conclusion that any Federal questions raised in the State Supreme Court by the petitions for writ of review which were not considered and decided by the State Court are not open to consideration in these proceedings.

However, in view of our inability to find a case exactly in point, we will, after presenting an argument in support of the correctness of the State Court's decision, through caution present a brief argument in support of the other questions presented to the Supreme Court of the State of California and which were not decided by it, so that in the event this Court concludes that it is incumbent upon it to decide these questions the Court will be fully advised as to the respondents' contentions.

THE ORDERS OF THE STATE COMMISSION ARE VOID BECAUSE THEY CONFLICT WITH THE POWERS CONFERRED UPON THE INTERSTATE COMMERCE COMMISSION BY THE TRANSPORTATION ACT OF 1920.

The proceedings were begun before the California Commission and the Southern Pacific and Salt Lake lines applied to that Commission to consolidate their terminal facilities and the California Commission entered upon a general investigation of the entire terminal situation at Los Angeles upon its own motion long before the passage of the Transportation Act of 1920. After the passage of that act the respondents formally questioned the jurisdiction of the State Commission in the proceedings before that body.

In the petitions for writs of review filed in the Supreme Court of the State of California there was drawn in question the validity of the California statute and the authority sought to be exercised thereunder by the State Commission, upon the ground that by reason of these amendments to the Interstate Commerce Act the validity of the California statute and the authority sought to be exercised thereunder by the Commission were in contravention of and repugnant to the Act to Regulate Commerce and to Section 8 of Article I of the Constitution of the United States (Tr. 180, 181, 187, 188, 192,

193), and it was held by the highest court of the state "that full power and authority over the matter of union terminal depot facilities of the railroads who are largely engaged in interstate commerce, and who are the petitioners herein, has been vested in the Interstate Commerce Commission under the terms of said amendatory act of 1920, and that by virtue thereof the Railroad Commission of California, one of the respondents herein, has been divested of the power, authority and jurisdiction over that subject, sought by it to be exercised in the several proceedings before it and by the order presented for review herein." (Tr. 233.)

It therefore appears that the question of the exclusive jurisdiction and control of the subject matter of these controversies by the Federal Commission and resultant lack of jurisdiction of the State Commission to enter the orders set forth in the transcript has been considered of controlling importance.

Requirements, Scope and Effect of the Orders of the State Commission

This question necessarily can not be determined without first giving consideration to the express requirements and necessary effect of the Commission's decisions and orders. In entering its second order the California Commission held that as far as its original decision and order were

considered "pertinent and of value" that it was approved except as modified in the second decision and order, and therefore the orders must be read and considered together.

As is stated by counsel for petitioner in the brief in support of their petition for the writ:

> "The relief asked by the various complaints included a *general investigation of the whole railroad and terminal situation*, the separation or abolition of dangerous grade crossings, and the construction and use jointly by the three railroad companies of the union passenger depot." (Br. pp. 3, 4.)

It is contended by the petitioner's counsel at page 3 of their supplemental brief that the order requires the respondents to:

> Procure jointly grounds for a union depot within a specified area.
>
> File plans and specifications jointly for the construction of a union passenger depot.
>
> Construction of a depot in accordance with the plans.
>
> Eliminate certain grade crossings.

Respondents agree that the requirements of the order are as stated by counsel but that there are many other requirements of the orders which have not been specified by petitioner's counsel and which will hereafter be set forth.

Elimination of Grade Crossings

So far as grade elimination is concerned it may be here stated that there never has been any controversy between the complainants in the proceedings before the Commission and the carriers, or between the carriers and the Commission, as to the necessity of eliminating the grade crossings specified in the Commission's order.

It may be incidentally related that under the plan proposed by the Southern Pacific and Salt Lake lines, as fully set forth in the application made by these lines (Tr. p. 31) and the agreement attached to the application found in the appendix of the supplemental transcript, (p. 573) according to the uncontradicted evidence of the engineering experts of these lines, would entirely eliminate all grade crossings of the steam lines and in addition would eliminate 21,600 street crossing movements of the Pacific Electric suburban trains daily, which would not be eliminated under the orders entered by the Commission. Unqualified statements to similar effect were made by counsel representing the carriers from the beginning of the proceedings until they closed their final arguments.

THE CALIFORNIA COMMISSION'S ORDERS REQUIRE RESPONDENTS TO EXTEND, ABANDON PORTIONS OF MAIN LINES AND TERMINAL FACILITIES, AND CONSOLIDATE TERMINAL FACILITIES, AND MAKE JOINT USE THEREOF.

Respondents disagree, however, with counsel's statements as to what the orders do not require. It is contended that the orders do not require the construction or extension of any line of railroad. It is unnecessary to refer to the transcript to refute this statement because of the statements contained in the brief filed by petitioner in support of their petition for the writ. The map attached to Petitioner's brief does not, as is contended by counsel at page 17 of that brief, show that the Salt Lake and Santa Fe lines border the area designated by the Commission in which the carriers are required to construct a union terminal. The map shows that the Salt Lake line does not own or operate any track that "borders" or in any wise reaches any part of the specified area. The Salt Lake line would be obliged to either extend its line across the Los Angeles River to the site of the union depot or arrange with either the Southern Pacific or Santa Fe lines for the joint use of their trackage, or as a possible alternative extend its lines from the point marked "spur" on the southerly portion of the map to which reference has been made across the river and thence through the industrial section of Los Angeles to the "area fixed by the order."

By reason of the fact that the Southern Pacific Company is obliged to eliminate all its main line traffic from Alameda Street from Fifteenth Street on the south to College Street on the north, a distance of three miles, thereby completely severing its main line operations between these points, it will be obliged to provide a means of carrying its lines between Fifteenth and College Streets by the "extension" of new lines or by the "joint use of main line and terminal facilities" of one or both of the other steam lines. This is conceded by counsel for petitioner at pages 17 and 18 of their brief where it is stated:

> "It is obvious from an inspection of the map that this southerly traffic can reach the proposed depot site in at least three different ways; by a *new line* which the Southern Pacific might construct along the river bed reaching the depot in the same way that the southerly lines of the Salt Lake and Santa Fe reach it; by some arrangement with either the Salt Lake or Santa Fe for a *joint use of tracks* for southerly traffic; by an amendment to the commission's order permitting the southerly traffic to come into the depot upon the present tracks along Alameda Street."

The suggestion contained in this statement that there be a further amendment to the Commission's order, of course should be given no consideration because we are here concerned with orders that have been made and sought to be effected and not with possible amendments thereof.

That there must be "extensions" of existing lines is further shown by the statement found on page 21 of the petitioner's brief to which reference has been made.

> "True, the erection of a new union depot and the elimination of grade crossings will require a rearrangement of traffic. Some new track may have to be laid and some old track abandoned."

The express provisions of the Commission's orders show conclusively that the carriers are required to make extensions in their lines. The orders provide that the carriers "proceed to the procurement of sufficient grounds within the boundaries hereinafter set out, and proceed with the construction of an adequate union passenger station thereon and buildings incidental thereto in the City of Los Angeles, and to make such *additions to, extensions of*, improvements and changes in the existing railroad facilities of said companies as may be reasonable necessary and incidental to the use of said union passenger station." (Tr. 146.)

It is further argued that the orders do not require the "abandonment of any line of railroad." It is inconceivable that such contention should be made in view of paragraph 14 of the final order entered by the California Commission. (Tr. 150, 151.) The Southern Pacific Company is required by this provision of the order to abandon this three miles of its main line for all train operation

over which it operates 39 main line passenger trains carrying interstate passengers each day. (C. R. C. Exhibit No. 29.)

Counsel for petitioner seek to discount these controlling facts by arguing (Br. p. 23:)

> "Here, the carriers will not abandon or cease operating their roads or any part of them. They will merely shift their lines in such a way as to carry on the same operations they do now, but with more safety and convenience to the public."

But, nevertheless, the admission is made (Br. 21) that "some new track may have to be laid and some old track abandoned." But the geography of the territory involved in the Commission's orders, as shown on the map incorporated in petitioner's brief and the statements contained in their brief, lead to the inevitable conclusion that the Commission's orders expressly and also by their necessary effect require the carriers to make extensions of their lines, to abandon portions of their lines, and further contemplate the joint use of terminal facilities, main line and trackage by the other carriers. (See petitioner's brief pp. 17, 18, 21, 26).

It is impossible to escape the conviction that the findings and conclusions of the Commission require a comprehensive abandonment, extension, and consolidation of the terminal facilities of re-

spondents at the City of Los Angeles, the extent to which the orders go being further emphasized by the fact that the respondents will be required to expend a sum of $36,002,191 in fulfilling the requirements of the Commission's orders irrespective of the expense of eliminating grade crossings. (C. R. C. Exhibit No. 2. S. P.-S. L. Exhibit No. 27.)

THE NEW NATIONAL POLICY DECLARED BY THE AMENDMENTS OF 1920 TO THE INTERSTATE COMMERCE ACT.

Under the provisions of the amendments to the Act to Regulate Commerce, approved February 28, 1920, Chapter 91, 41 Stats. at L. 456, Congress enlarged the authority of the Interstate Commerce Commission and vested the Commission with power and authority to require carriers "subject to the jurisdiction of the Interstate Commerce Commission" to extend and consolidate their lines and terminal facilities thereby depriving state commissions of any similar jurisdiction that they might previously have exercised, and no carrier may abandon any portion of its line without express authority of the Interstate Commerce Commission.

In deciding the case of *Railroad Commission of Wisconsin, et al. vs. C. B. & Q. Ry. Co.*, 257 U. S. 563, this court, referring to the compre-

hensive amendments that had been made to the Interstate Commerce Act held that it was "manifest from this very condensed recital that the act made a new departure" and we may add not only as far as the regulation of rates is concerned but also with reference to the financial affairs and actual operations of the carriers.

This court has had frequent occasion to consider these amendments to the Interstate Commerce Act and it is therefore deemed unnecessary to do more than make brief reference to the amendments upon which respondents rely.

In construing the amended act in order to properly determine what jurisdiction has been confided to the Interstate Commerce Commission to the exclusion of the state commissions, it is necessary in accordance with the elementary rule of statutory construction to consider the act in its entirety.

It will then become apparent that Congress in the exercise of its constitutional power sought by these amendments to vest the Federal Commission with authority to regulate carriers "subject to the jurisdiction of the Interstate Commerce Commission" in a more comprehensive and complete manner than was contemplated prior to the amendments of 1920, and that it was the intention of Congress to occupy by Federal control the entire field as far as necessary to comprehensively

regulate the operation and financial affairs of interstate carriers in order to make certain that the transportation needs of the entire country would be most completely served and protected.

Congress Has Covered Every Detail of the Subject so Completely and in Such a Manner as to Manifest Its Purpose to Exercise Its Constitutional Authority and Therefore the Regulating Power of the States to Compel Extensions, Abandonments, Consolidations and Joint Use of Terminal Facilities Has Ceased to Exist and All State Regulations of These Matters Have Been Superseded.

Until these amendments to the Federal statute became effective the Interstate Commerce Commission had no power to regulate interstate carriers in these particulars but by the enactment of this amended law Congress undertook to adopt a "national policy" which contemplates the exercise of Federal power heretofore lying dormant, thereby automatically divesting the several state commissions of power to effect consolidation of terminals and other facilities or the abandonment or extension of the lines of carriers subject to the jurisdiction of the Federal Commission.

Erie R. R. Co. vs. N. Y., 233 U. S. 671, and cases cited.

Houston, East & West Texas Ry. Co., vs. U. S., 234 U. S. 342.

Adams Express Co. vs. Croninger, 226 U. S. 491.

Texas & Pacific Ry. Co. vs. Rigsby, 241 U. S. 33, 41-2.

Northern Pacific Ry. Co. vs. Washington, 222 U. S. 370, 378.

Railroad Comm. of Wisconsin vs. C. B. & Q., 257 U. S. 563.

In deciding the Minnesota Rate Case, the Supreme Court of the United States held that:

> "The power of Congress to regulate commerce among the several states is supreme and plenary. It is 'complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.'"
>
> *Minnesota Rate Case*, 230 U. S. 352, 398, citing Gibbons v. Ogden, 9 Wheaton, 1.

The Supreme Court further held that:

> "there is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of federal power. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on, and the full control by Congress of the subjects committed to its regulation is not to be denied by the commingling of interstate and intrastate operations."

State commissions may act in such matters under authority vested in them by state statutes until the Congress has vested the Federal Commission with similar power, and whenever the Federal Govern-

ment undertakes to regulate such matters the power of the state commission is automatically divested.

> "Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress and not the state that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the state and not the nation would be supreme within the national field."
>
> (*Houston, etc. R. Co. v. U. S.*, supra.)

In deciding the case of Akron C. & Y. Ry. Co. vs. U. S., decided February 19, 1923, U. S. Supreme Court Advance Opinions, No. 10308, this court held that the

> "Transportation Act, 1920, introduced into the Federal legislation a new railroad policy. * * * Theretofore, the effort of Congress had been directed mainly to the prevention of abuses; particularly, those arising from excessive or discriminatory rates. The 1920 Act sought to insure, also, adequate transportation service. That such was its purpose, Congress did not leave to inference. The new purpose was expressed in unequivocal language. And to attain it, new rights, new obligations, new machinery, were created. The new provisions took a wide range. Prominent among them are those specially designed to secure a fair return on capital devoted to the transportation service. Upon the Commission new powers were conferred and new duties were imposed."

Mr. Chief Justice Taft, speaking for an unanimous court in deciding the case of *Railroad Commission of Wisconsin, et al., v. C. B. & Q. R. R. Co.*, supra, where the comprehensive amendments to the Federal statute were under review, held that:

> "Congress in its control of its interstate commerce system is seeking in the Transportation Act to make the system adequate to the needs of the country by securing for it a reasonable compensatory return for all the work it does. The states are seeking to use that same system for intrastate traffic. That entails large duties and expenditures on the interstate commerce system which may burden it unless compensation is provided for the intrastate business reasonably proportionate to that for the interstate business. Congress as the dominant controller of interstate commerce may, therefore, restrain undue limitation of the earning power of the interstate commerce system in doing state work. The affirmative power of Congress in developing interstate commerce agencies is clear. *Wilson v. Shaw*, 204 U. S. 24; *Luxton v. North River Bridge Co.*, 153 U. S. 525; *California v. Pacific Railroad Company*, 127 U. S. 1, 39. In such development, it can impose any reasonable condition on a state's use of interstate carriers for intrastate commerce it deems necessary or desirable. This is because of the supremacy of the national power in this field."

The Railroad Commission of the State of California likewise apparently recognizes that the Interstate Commerce Commission has, by the amendments of the Federal statute, been vested

with exclusive jurisdiction in matters relating to the abandonment or extension of lines or the consolidation of terminal facilities.

This statement is supported by the decision rendered by the Commission on April 26, 1921 (Tr. 68), where it was held:

> "The recognition of the necessity that in the future we must have in this country unified railroad terminal development in the larger cities has been definitely incorporated by Congress in the new Transportation Act. It is in that Act also recognized that it will not be sufficient to leave the necessary terminal unification to the carriers alone. *Power is given the Interstate Commerce Commission in the Esch-Cummins Act, to order terminal unification.* This, it seems to us, is a sound and inevitable development. With the present relation between the railroads and the people, whereby the government undertakes to fix rates under a prescribed system, designed to give to the railroads, as nearly as may be, a guaranteed income, in addition to a guaranteed reimbursement of operating expenses, it seems self-evident that every effort must be made to furnish the best possible transportation facilities at the lowest possible cost. * * *"

It therefore appears that the Railroad Commission of the State of California and the highest court of that state have confirmed respondent's understanding of the law.

Petitioner, however, specifies as errors for the reversal of the judgment of a state court that:

> "The California commission has authority under state law * * * to order the three railroad companies to erect a union depot.
>
> The state Court erroneously construed the federal statute amendatory of the Interstate Commerce Act as having deprived the state of this jurisdiction and vested it in the Interstate Commerce Commission.
>
> The state Court failed to give effect to the proviso of Section 1, paragraph 17 of the amended Interstate Commerce Act and to the principle announced in the case of Missouri Pacific Railway Company v. Larabee Flour Mill Company, 211 U. S. 612." (Br. pp. 18, 19.)

Counsel argues that the state's power remains unimpaired and the state commission's order is valid unless the Interstate Commerce Commission makes an inconsistent order.

In other words it is the contention of petitioner that notwithstanding the fact that Congress has vested the Interstate Commerce Commission with the control and supervision of the financial and physical operations of carriers, including the all important questions of extensions and abandonment of their lines, consolidation and joint use of main tracks and terminal facilities, these powers confided to the interstate Commerce Commission, unless actually exercised in a particular case, leave any powers which may be vested in the state commission unimpaired and in full force and effect.

Petitioner contends that the case of *Missouri Pacific Ry. Co. v. Larabee Flour Mills Co.*, 211 U. S. 612, is controlling.

In that case the jurisdiction of the Supreme Court of Kansas was invoked by the Mill Company for a writ of mandate compelling the railroad to discharge its *common law* obligation of switching cars locally between a foreign line and the plant of the Mill Company. The right was not asserted under any State statute nor under any order rendered by a commission or other regulatory body. The refusal of the railroad company to perform this *local switching* "was based solely upon the ground" that certain demurrage charges had not been paid by the Mill Company and not upon the ground "that the service constituted a part of interstate commerce." After its refusal to switch for the Mill Company the railroad continued to perform similar services for other industries and this Court held that the railroad was obliged to treat all industries alike irrespective of any legislative enactment or special mandate from any commission because "the duty arose from the fact that it was a common carrier", and that this obligation, irrespective of legislative action or special mandate, could be enforced by the courts. This Court affirmed "the oft repeated rule that the State in the absence of express action by Congress may regulate matters which *indirectly* affect interstate commerce" and cited authorities in support of the well recognized rule that "the mere grant of such a power *to* Con-

gress would not imply a prohibition on the States to exercise the same power. That it is not the mere existence *of* such a power but its exercise *by* Congress which may be incompatible with the exercise of the same power by the States and that the States may legislate in the *absence* of Congressional legislation." The Court further held that merely because Congress had vested the Interstate Commerce Commission with "a large measure of control over interstate commerce," nevertheless in the absence of *specific* action by Congress or the commission the control of the State over these *merely incidental* matters remains undisturbed." The Court inferentially held that the switching involved was an "incidental matter" and that "this common law duty the State in a case like the present may, at least in the absence of Congressional action, compel a carrier to discharge."

It may be noted that the dissenting opinion by Mr. Justice Moody, with which Mr. Justice White concurred, and with which Mr. Justice Holmes stated he was inclined to agree, held that assent could not be given to the proposition that although Congress had vested the Federal Commission with authority to deal with the exact situation presented this fact was immaterial because the Commission had taken no action.

But for the purposes of this argument we will accept the views expressed in the majority opinion as settled law. Nevertheless it is our contention

that the Larabee case does not support petitioner's conception of the law but is wholly inapplicable because under the facts set forth in that decision it appears that the Court was dealing with what the opinion aptly styled "regulations of a local character", namely, a local switching service, which was characterized by the court as "incidental matters", whereas in the case at bar we are dealing with orders requiring three transcontinental railroads engaged largely in interstate commerce to expend millions of dollars in extending and abandoning their main lines, and enlarging, abandoning and consolidating their terminal facilities.

The principle of the Larabee Case has no application here because of the Transportation Act itself Congress has put an inhibition upon the carriers, coupled with severe penalties, prohibiting them from extending their lines, from abandoning lines, from consolidating lines, except upon permission first obtained from the Interstate Commerce Commission. By such action Congress has clearly taken away from any other body except the Interstate Commerce Commission power to compel the carriers to do these very things, whereas, in the Larabee Case, Congress had merely at the most conferred upon the Interstate Commerce Commission general power upon the complaint of shippers to enter specific orders regulating the practices of carriers relating to switching.

Congress Has "Acted" by Exercising Its Constitutional Authority in Regulating the Matters Covered by the Commission's Orders and Power Thus Exercised Is Incompatible with the Exercise of the Same Power by the States.

It can not be held that the orders of which complaint is made here are merely "local" or "incidental", but it is apparent that the orders directly interfere with and burden interstate commerce, and that irrespective of any action by the Commission, Congress has "specifically acted" in adopting the amendments to the Interstate Commerce Act of 1920.

In deciding the case of *Southern Ry. Co. v. Railroad Comm. of Indiana*, 236 U. S. 439, 446-8, the Court held:

> "The test, however, is not whether the State legislation is in conflict with the details of the Federal law or supplements it, but whether the State had any jurisdiction of a subject over which Congress had exerted its exclusive control."

The question to be determined here, as in the case of *Southern Ry. Co. v. Reid*, 222 U. S. 436, is "to what extent and how directly must it (the power of Congress) be exercised to have * * *" the effect of superseding the concurrent power of the State which might be exercised in the absence of Congressional legislation.

After quoting the rule announced in the Larabee case the Court held that "the principle of that case, therefore, requires us to find specific action either by Congress in the Interstate Commerce Act or by the Commission covering the matters which the statute * * * attempts to regulate." "Does it (the action by Congress) * * * take control of the subject-matter and impose affirmative duties upon the carriers which the State cannot even supplement? In other words, has Congress taken possession of the field?"

In the case of *Southern Ry. Co. v. Reid & Beam*, 222 U. S. 444, 447, referring to the preceding decision in the Reid case, the Court held that "there need not be directly 'inhibitive congressional legislation,' but congressional legislation which occupies the field of regulation and thereby excludes action by the State."

The Larabee case was again cited by this Court in deciding the case of *M. K. & T. Ry. Co. of Texas v. Harris*, 234 U. S. 412, 417, and, as in the Reid case, emphasis was laid upon the fact that interstate commerce was only "incidentally affected" and was not "directly burdened or interfered with" by the judgment of the State Court enjoining upon the carrier the duty of discharging its common law obligation. It was held by the Court in the case last cited that the State statute only dealt with a question of costs "respecting which Congress had

not spoken" and that "only until Congress did speak the State might enforce its statutes which only 'incidentally' affected interstate commerce." Where, however, a State statute or an order of a State commission does not merely "incidentally" affect interstate commerce, but does directly interfere with or burden interstate commerce, this Court has uniformly held that the authority sought to be exercised by the States either through the medium of their administrative or judicial tribunals must fall and the carriers relieved from complying with any such orders.

> "When Congress acts in such a way as to manifest its purpose to exercise its constitutional authority the regulating power of the State ceases to exist."

Erie R. R. Co. v. N. Y., 233 U. S. 671.

Minnesota Rate Cases, 230 U. S. 352, 399-412.

Houston, East & West Texas Ry. Co. v. U. S., 234 U. S. 342.

N. Y. C. R. R. Co. v. Hudson County, 227 U. S. 248, 264.

Second Employers' Liability Cases, 223 U. S. 47-8, 53-55.

Southern Railroad Co. v. Railroad Commission of Indiana, 236 U. S. 439, 446-448.

A. T. & S. F. Ry. Co. v. Harold, 241 U. S. 371, 378-379.

T. & P. Ry. Co. v. Rigsby, 241 U. S. 33, 41-42.

Southern Ry. Co. v. Prescott, 240 U. S. 632, 639-640.

Atlantic Coast Line R. R. Co. v. Georgia, 234 U. S. 280, 291-4.

Pa. R. R. Co. v. Public Service Commission, 250 U. S. 556, 569.

Spokane & Inland R. R. v. Campbell, 241 U. S. 497, 509.

Boston & Maine R. R. v. Hooker, 233 U. S. 97, 110.

A. T. & S. F. Ry. v. Robinson, 233 U. S. 173-180.

Seaboard Air Line Ry. v. Horton, 233 U. S. 492, 501.

Taylor v. Taylor, 232 U. S. 363, 368.

St. Louis, etc. Ry. Co. v. Seale, 229 U. S. 156, 158.

St. Louis, I. M. & S. Ry. Co. v. Hesterly, 228 U. S. 702, 704.

Michigan Central R. R. Co. v. Vreeland, 227 U. S. 59, 66-7.

St. Louis v. Edwards, 227 U. S. 265, 268-9.

To borrow the language used by this Court in deciding the case of *Adams Express Co. v. Croninger*, 226 U. S. 491:

> "Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all State regulation with reference to it."

Railroad Comm. of Wisconsin v. C. B. & Q. R. R. Co., supra.

Akron C. & Y. Ry. Co. v. U. S., supra.

The language employed by this Court in deciding the case of *Northern Pacific v. Washington*, 222 U. S. 370, 378, aptly states the rule to be followed in determining whether *Congress* has acted.

> "It is elementary, and such is the doctrine announced by the cases to which the court below referred, that the right of a State to apply its police power for the purpose of regulating interstate commerce, in a case like this, exists only from the silence of Congress on the subject, and ceases when Congress *acts* on the *subject or manifests its purpose to call into play its exclusive power*. This being the conceded premise upon which alone the state law could have been made applicable, it results that as *the enactment by Congress* of the law in question was an assertion of its power, *by the fact alone of such manifestation* that subject was at once removed from the sphere of the operation of the authority of the State."

See also *Gulf, etc. Ry. Co. v. Hefley*, 158 U. S. 98, 104-5.

The most cursory examination of the Interstate Commerce Act as now amended, particularly Subdivision 15 of Section 1; Subdivisions 18 to 22, inclusive, of Section 1; Subdivision 4 of Section 3; Subdivision 4 of Section 5; section 15a, and Section 20a, will bear out the statement that the powers which have been confided to the Federal Commission are incompatible with the exercise of the same powers by the states. This court characterized the provisions found in Section 15a of the act as "the most novel and most important features of the

act * * *," as it requires the Commission to prescribe rates so as to enable carriers engaged in interstate commerce, as a whole or in groups selected by the Commission, to earn an aggregate annual net railway operating income equal to a fair return upon the aggregate value of the railway property used in transportation, and sought to avoid excessive incomes accruing to the carriers better circumstanced by using one half of the excess for loans to other carriers. The provisions of Subdivision 4 of Section 5 are also novel and make a "radical departure" in enjoining upon the Commission the duty "as soon as practicable" to adopt a plan "for the consolidation of the railway properties of the continental United States into a limited number of systems."

> "The act further put under the control of the Interstate Commerce Commission, 1st, the issuing of future railroad securities by the interstate carriers; 2nd, the regulation of their car supply and distribution and the *joint use of terminals;* and, 3rd, their *construction* of new lines, and their *abandonment* of old lines.
> * * * * * * * *
> The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States. This is expressly declared in Section 15a to be one of the purposes of the bill."
>
> *Railroad Comm. of Wisconsin v. C. B. & Q. R. R. Co.*, supra.

The policy declared by Congress is national in its scope and in administering the act the Commission is enjoined to give consideration to the transportation needs of the country and the "necessity of enlarging facilities" to "best promote the services in the interest of the public and the commerce of the people" and to this end Congress has established the Railroad Labor and Adjustment boards, has vested the Federal Commission with power relating to the raising of capital by new government loans, loans from the general railroad contingent fund, the issuing of new securities, consolidation of railroads into a limited number of systems, joint use of terminals, and the interchange of traffic.

It is for the Federal Commission to say whether there is necessity for the enlargement of facilities and to determine whether conditions and betterments are necessary or whether the amounts expended therefor are reasonable, whether the management of the interstate carriers has been honest, efficient, and economical, to determine what expenditure shall be charged, and capital account, and operating expenses. The declared national policy of Congress can not be carried into effect but will be hampered and retarded, and interstate commerce burdened if not destroyed, and the transportation systems of the nation demoralized, if the states are to be left free to enter orders such as these.

The States Can No More Supplement the Requirements of the Federal Statute than They Can Annul Them.

Counsel for petitioner in attempting to uphold the jurisdiction of the State Commission suggest in the brief filed in support of petition for the writ, page 29, that if in "partial compliance with the State Commission's orders it should become necessary to invoke the jurisdiction of the Interstate Commerce Commission in connection with any part of the work, such as the joint use of tracks or for the issuance of securities" * * * "there is no reason why application therefor can not be made to the Interstate Commerce Commission at that time." In effect they are suggesting the concurrent jurisdiction of the Federal and State Commissions. Any such contention is opposed to the authorities already cited.

In deciding the case of *Southern Ry. Co. v. Railroad Commission of Indiana*, 236 U. S. 439, 446-448, the Court cites the case of *Prigg v. Commonwealth of Pennsylvania*, 16 Pet. 539, 617, where it was held:

> "If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the state legislatures have a right to interfere; and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose."

In deciding the case of *Erie R. R. Co. v. N. Y.*, 233 U. S. 671, it was held that notwithstanding a Federal statute did not become operative until a year after its adoption, that nevertheless the State could not in the interim enforce similar legislation upon the ground that "the State had simply supplemented the action of the Federal authorities." It was held that there may not be a division of the field of regulation "but an exclusive occupation of it when Congress manifests a purpose to enter it."

It was held in the case of *Pennsylvania R. R. Co. v. Public Service Commission*, 250 U. S. 566, 569:

> * * * * "When the United States has exercised its exclusive powers over interstate commerce so far as to take possession of the field, the States no more can supplement its requirements than they can annul them." Citing cases.

The rule is well stated in the case of *Charleston & Western Carolina Ry. Co. v. Varnville Furniture Co.*, 237 U. S. 597, 604.

> "When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go." Citing cases.

Petitioner has argued, page 19 of brief filed in support of petition, to the effect that the California statute is broader in its scope than the Interstate Commerce Act because no provision is contained in the Interstate Commerce Act authorizing the erec-

tion of "union passenger depots." But as has already been shown, it will become necessary in erecting a union passenger depot to extend and abandon main lines and terminal facilities of respondents, consolidate their terminal facilities and provide for the interchange of traffic, which are particular subjects of regulation which now have been confided to the Federal Commission. Under the authorities last cited it can not be held that even though the California statute is susceptible to the interpretation placed upon it by petitioner's counsel, and "attempts to go farther than Congress has seen fit to go" it thereby is resurrected and given efficacy. As was said in the case of *Gulf etc. Ry. Co. v. Hefly, supra*:

> "It is unnecessary to pursue this discussion further. The State statute and the national law operate upon the same subject-matter, and prescribe different rules concerning it. The national law is unquestionably one within the competency of Congress to enact under the power given to regulate commerce between the States. The State statute must, therefore, give way."

Construction Placed Upon the Transportation Act by State Courts.

The courts of several of the States have, since the Interstate Commerce Act was amended in 1920, had occasion to consider the relative jurisdiction of the Interstate Commerce Commission and State commissions as affected by these amendments.

The case of *State ex rel, etc. v. Atlantic Coast Line R. R. Co., Florida*, 87 Southern Reporter, 773, decided February 15, 1921, involved the construction of the Transportation Act, 1920, and involved the jurisdiction of the State Commission to require a railroad to make a physical connection between its lines and the wharf operated by the Clyde Steamship Company. The Supreme Court of Florida had in an earlier decision required the carrier to make such connection under the provisions of the Florida statute but upon its attention being directed to the provisions contained in the Transportation Act, vesting the Interstate Commerce Commission with power to compel carriers to make such physical connections between their lines and water carriers, held that the

> "entire and exclusive jurisdiction over the matter of requiring physical connection between rail and water carriers has been given by Congress to the Interstate Commerce Commission, and there is no field for the operation of State laws, or control by the State Railroad Commission, over the same subject-matter."
>
> "Until Congress gave to the Interstate Commerce Commission entire and exclusive jurisdiction over the matter of physical connection between rail and water carriers, the State had full power and jurisdiction over the subject; but when Congress exercised the power, and lodged the entire and exclusive jurisdiction over it in the Interstate Commerce Commission, the right of the State over the same subject-matter was extinguished."

At page 778 of the opinion the Court cites the case of *Missouri Pacific Ry. Co. v. Larabee Flour Mills Co.*, supra, and distinguishes the case upon the ground that in the Larabee case Congress had not expressly vested the Interstate Commerce Commission with the "power and duty with regard to switching service" and held that if such authority had been vested in the Federal Commission to the same extent that it had vested the Commission with power to require physical connections between rail and water lines, that the Supreme Court of the United States would have held otherwise.

Congress has, by Subdivision 4 of Section 3 of the amended act, expressly vested the Interstate Commerce Commission with power to require carriers owning terminal facilities to permit the use by other carriers of such terminal facilities including the main track or tracks for a reasonable distance outside of such terminals.

We direct the Court's attention to the fact that there is no express provision in the Public Utilities Act of California requiring one railroad to admit another to the joint use of its private property. If any such power is found it is in Section 41 of the Act, which merely authorizes the California Commission to admit another carrier to the joint use of its tracks situated on, over or under any street or highway. No power is conferred upon the California Commission to compel the joint use of

tracks where they are situated on privately owned right of way, but even though such power had been conferred the Federal statute would nevertheless be controlling.

The Supreme Court of the State of New York has likewise held that an order of the Public Service Commission of that State requiring carriers to make connections between their lines and to provide such tracks and facilities as "may be necessary to establish and furnish adequate and convenient interchange of freight * * *" is repugnant to the provisions of paragraph 2 of Section 3 of the Interstate Commerce Act, as amended in 1920, requiring carriers to provide for the interchange of traffic between their respective lines, and that the Congressional Act "excludes the jurisdiction of the State Public Service Commission to make the same requirements of interstate carriers under the principle that Congress having delegated to the Interstate Commerce Commission power to deal with the subject matter, an exercise of like power by the State is thereby superseded."

> *People v. Public Service Comm.*, 135 N. E. 195, 196, 197.

The case of *People, ex rel New York Central R. R. Co. v. Public Service Commission*, 190 N. Y. Supplement, 636, holds that the Transportation Act as amended,

> "not only gives the Interstate Commerce Commission power to establish physical connection

between lines of rail carriers and docks, but also to direct rail and water carriers, singly or jointly, to construct and connect with lines and to determine and prescribe the terms and conditions of operating such connections, and that thereby "such matters are entirely removed from the State and its Public Service Commission has no authority to order such connections."

This decision was affirmed in a memorandum opinion by the New York Court of Appeals, 134 N. E. 590, that court simply saying that the subject matter of the controversy had by the Transportation Act of 1920 been relegated to the Interstate Commerce Commission. Thereupon application was made to the Supreme Court of the United States for a writ of certiorari, which application was denied without an opinion (258 U. S., 621).

The latest case which has been brought to our attention is that of *Shealy, et al. v. Southern Ry. Co.*, decided by the Supreme Court of the State of South Carolina, April term, 1923 (opinion not yet published), involving the jurisdiction of the Railroad Commission of South Carolina to compel the railway company to construct certain station sheds at a station on its lines. The Court refers to previous decisions rendered by it sustaining the power of the State Commission to enter such orders, but states that the cases cited are not controlling by reason of the fact that:

> "The Transportation Act of 1920 effected a radical departure, and introduced into Federal legislation a new railroad policy. It has placed the entire control over rates, properties, tracks, terminals and facilities of railroads engaged in interstate commerce, in and under the jurisdiction of the Interstate Commerce Commission."

The Court supports its decision by the case of *Akron C. & Y. Ry. Co. v. U. S.*, cited therein, and cites with approval the decision rendered by the Supreme Court of the State of California in the case at bar. The Court further held:

> "Another consideration is conclusive of the purpose of the Act to control the matter of non-productive, additional facilities and terminals, and having pre-empted this field, all regulation by the States is interdicted. This matter is not only subjected to the control of the I. C. Commission, but it is so inter-related with the purpose of the Act in supervising transportation facilities and in fixing rates, that interference by the States therewith necessarily affects interstate commerce."

The Court then goes on to analyze the amendments of 1920 to the Federal statute and holds that the policy announced by Congress will be thwarted and will result "in the complete breaking down and ultimate failure of the Constitutional purpose * * *" if the States are permitted to continue to exercise the powers relating to the enlargement and extension of transportation facilities by interstate carriers.

We have been able to find but two decisions rendered by state courts where a rule contrary to that announced by the Supreme Court of the State of California is sustained. That of *C. R. I. & P. Co. v. State of Oklahoma,* 217 Pac. Rep. 147, where it was held that, notwithstanding the amendments made to the Transportation Act, 1920, the State of Oklahoma still might, through its Corporation Commission, require railroads engaged in intrastate and interstate commerce to provide adequate passenger facilities "except when such orders are inconsistent with some lawful order of the Interstate Commerce Commission or when said orders amount to an unjust discrimination against interstate commerce or amount to an unjust and unreasonable burden on interstate commerce and would interfere with the railroads in complying with their obligations in relation to interstate commerce." This case was decided prior to the announcement of the decision by this court in the Akron case. The state court reached the conclusion that by the amendments to the Federal Statute, Congress did not intend to occupy the field of regulating interstate commerce to the extent of preventing the state commissions from compelling carriers to enlarge their passenger facilities unless the Interstate Commerce Commission had previously entered such an order. The court gives no consideration to the broad scope of Federal regulation or the adoption of the new Congressional policy as so thoroughly outlined in the case of *Akron C. & Y. Ry Co. v. U. S.*, and

Shealy et al. v. Southern Ry. Co., supra, but rests its decision largely upon the proviso of Subdivision 17 of Section 1 of the act. It would appear that the Oklahoma court, in an effort to sustain the jurisdiction of the State Corporation Commission, has placed a narrow and strained construction upon the amended Interstate Commerce Act and has given no consideration to the conflict which would inevitably result from such construction of the Federal statute. Orders such as were entered by the Oklahoma Commission would directly interfere with and burden interstate commerce.

The Supreme Court of North Carolina has rendered a decision, the full text of which is not at hand, and we are therefore unable to review this decision at this time.

The foregoing authorities make it apparent that the state courts where questions similar to those in the case at bar have been raised have, with the exceptions noted, held in accordance with the California court that the statutes of their respective states have been superseded and the powers with which their Public Service Commissions were formerly vested have been circumscribed and superseded by the adoption of the new national railroad policy.

The Decisions of the Interstate Commerce Commission, Construing the 1920 Amendments to the Interstate Commerce Act, are in Harmony with the Decision of the Supreme Court of California.

In deciding the case of *T. & P. Ry. Co. v. Abilene*, 204 U. S. 426, 433, it was held that the conclusion reached by the court was "greatly fortified * * * by the * * * reports and decisions of the Interstate Commerce Commission" and it therefore may be well in passing to direct the court's attention to the numerous decisions rendered by the Interstate Commerce Commission wherein the Commission has assumed jurisdiction of matters involving questions arising under the amendment to the Interstate Commerce Act of 1920.

In construing the amendment to Section 3 of the Act relating to the interchange of traffic between connecting carriers, the Commission has held:

> "As amended by the Transportation Act this provision of the law gives us a direct and explicit power to require the use by one carrier of the 'terminal facilities' of another carrier upon certain conditions. It is apparent that the policy of Congress was thus reversed."
>
> *Hastings Commercial Club et al. v. C. M. & St. P. Ry. Co.*, 69 I. C. C. 489, 493.

It will be found that in rendering its decision in the Cleveland Passenger Terminal Case, decided August 21, 1921, 70 I. C. C. 342; decision on re-

hearing same case, December 6, 1921, 70 I. C. C. 659; the Commission authorized the carriers to construct a joint passenger terminal at Cleveland, after giving consideration to the question whether the terminal facilities were required to meet the demands of interstate traffic, whether the location of the union terminal would serve the convenience of interstate passengers, *whether the cost of financing the construction of the terminal was such as to unduly burden interstate commerce.* The Commission reviewed the entire situation relating to all the business of the carriers, state and interstate.

In determining the questions raised by the *Application of Illinois & Kentucky R. R. Co.* to construct line between Edgewood and Metropolis in the State of Illinois, 82 I. C. C. 100, 105, it was held by the Commission: "In our consideration of applications under paragraph 18 of Section 1 of the Interstate Commerce Act we are concerned primarily with the requirements of public convenience and necessity."

The Federal Commission has asserted jurisdiction over these subjects in granting the certificate authorizing Oregon Short Line Railroad to construct a line in Idaho, a distance of 2.66 miles, under the provisions of paragraph 18 of Section 1.

82 I. C. C. 133;
Abandonment of Caddo & Choctaw Railroad,
82 I. C. C. 90.

The Interstate Commerce Commission has constantly exercised its jurisdiction to grant authority to interstate railroads subject to its jurisdiction to either construct or abandon short stretches of line.

> Application for abandonment of branch line by Great Northern denied. 72 I. C. C. 25.
>
> Application for construction of line in Michigan by Michigan Northern denied. 72 I. C. C. 21.
>
> Application of C. & A. R. R. Co. for authority to construct line of railroad granted. 72 I. C. C. 1.
>
> Application of Silverton Ry. Co. for authority to abandon its line of railroad granted. 72 I. C. C. 13.
>
> Application of Virginia & Western Ry. Co. for authority to extend its line of railroad granted; permission to retain excess earnings denied. 72 I. C. C. 55.

It thus appears that the Interstate Commerce Commission has placed a practical construction upon the amendments of 1920, has asserted and exercised jurisdiction over these matters, and that the carriers which are subject to the jurisdiction of that Commission have believed it necessary to invoke the jurisdiction of the Commission to obtain these permissive orders before making extensions or abandoning portions of their line and terminal facilities, even though they involve but short stretches of track. The carriers could not proceed otherwise because of the severe penalties imposed

by the amendments for failure to obtain permission of the Federal Commission before extending or abandoning lines or consolidating terminal facilities.

THE PROVISO FOUND IN SUBDIVISION 17 OF SECTION 1 OF THE TRANSPORTATION ACT OF 1920 DOES NOT RESERVE TO THE STATE POWER TO MAKE THE ORDERS HERE INVOLVED.

That proviso reads as follows:

> "Provided, however, that nothing in this act shall impair or affect the right of a state in the exercise of its police power to require just and reasonable freight and passenger service for intrastate business, except in so far as such requirement is inconsistent with any lawful order of the Commission made under the provisions of this act."

The proviso is contained in the paragraph which makes provision for the Commission to act through such agencies as it shall designate to carry out its orders relating to "car service" as defined in paragraph 10 of the section, and in cases of emergency as provided in paragraph 16 of the section, and where carriers are unable to transport the traffic offered as provided in paragraph 17 of the section, the remaining part of section 17 relating to the penalties which may be imposed by the Courts for failure of a carrier to follow its directions as to car service and to the matters referred to in paragraphs 15 and 16.

It would appear that the proviso relates exclusively to these matters and the only practical construction which can be placed on the proviso is that it merely reserves to the states the right to require just and reasonable passenger service for *intrastate* business in these particulars.

In any event the proviso is not susceptible to the construction that it is operative in cases such as this, where the Commission's orders directly interfere with and burden a large volume of *interstate* traffic. Nor will it bear an interpretation which will prevent the Interstate Commerce Commission from discharging its affirmative duty "to maintain an adequate railway system service for the people of the United States" which is "expressly declared in Section 15a to be one of the purposes of the bill."

> *Railroad Comm. of Wisconsin v. C. B. & Q.*, supra.

This proviso neither confers power on the state authorities, nor takes power from the Interstate Commerce Commission. It declares a rule of construction; and it is the same rule which courts have followed and which they would have adopted in construing the Transportation Act without the proviso. For surely no one would assert that the amended act without the proviso deprives a state of power

to require carriers to furnish equipment and move shipments and passengers from point to point in that state with reasonable dispatch and furnish all necessary facilities for handling such *local* business.

But the proviso is strictly limited to this local intrastate business. It does not even save to the state the right to make orders which indirectly or incidentally affect interstate commerce where such orders are made under the police powers of the state; as for instance the number of local trains which shall be run, the times and speeds at which such trains shall be operated, and kindred matters. Those regulations must rest now, as heretofore, on the general police powers of the state.

But in the case at bar the action of the state is not limited to intrastate business. The purpose of the orders would not have been achieved if so limited. Los Angeles is the most populous city in the western half of the United States. And these orders run against three transcontinental lines, the passenger traffic of each of which, in and out of Los Angeles, is chiefly interstate. Here is the western terminal of the Salt Lake Line, now a part of the Union Pacific System; the chief western terminal of the Atchison Line; and one of the main terminals of the Southern Pacific Line.

This is no matter of a waiting room at a way station but of a great new edifice to accommodate all the passengers, mail, express and baggage arriving and departing at one of the largest cities in the country.

It would be folly for the state to say to these carriers: You must receive and set down all your intrastate passengers at Los Angeles on the platform of a union station. Unless the state may control the handling of the passenger traffic, interstate as well as intrastate, and may order that all the business should be handled at one station, including mail, passengers, express and baggage, the whole purpose of the order fails. For the State Commission aims by its order to end the delivery and receipt of passengers, baggage, etc., at the existing stations, especially the large and comparatively new Southern Pacific station.

The Interstate Commerce Commission could not regulate the transportation of interstate carriers from a national standpoint if state commissions were permitted to interfere with and burden interstate commerce to the extent such traffic would be affected by orders such as these, and the Congressional policy to place the entire control of railroad properties, rates, finances, operation, terminals, and facilities under the jurisdiction of the Interstate Commerce Commission would be rendered

nugatory and the Interstate Commerce Commission would be impotent to carry into effect the provisions of Section 15a of the act, and of Subdivision 4 of Section 5, which enjoins upon the Interstate Commerce Commission the duty "as soon as practicable" to "adopt a plan for the consolidation of the railway properties of the United States into a limited number of systems."

When consideration is given to the "new national policy" sought to be accomplished by Congress in adopting the comprehensive amendments of 1920, the only reasonable and practical construction which can be placed upon the proviso without doing violence to the declared policy of Congress is that the several states may issue necessary orders "to require just and reasonable freight and passenger service for *intrastate* business * * *" in cases where such orders do not directly affect or interfere with or burden interstate commerce.

Counsel quotes from the Congressional Record (brief for petition, pp. 30, 31) to aid in construing the amended act, but the language used in the act is clear and unequivocal and in construing the amended act this court has held:

> "Great stress is put on the legislative history of the Transportation Act to show that

the bill was not intended to confer on the Commission power to remove any discrimination against interstate commerce involved in a general disparity between interstate and intrastate rates. Committee reports and explanatory statements of members in charge made in presenting a bill for passage have been held to be a legitimate aid to the interpretation of a statute which in its language is doubtful or obscure. (Citing cases.) But when taking the act as a whole the effect of the language used is clear to the court, extraneous aid like this cannot control the interpretation. (Citing cases.) Such aids are only admissible to solve doubt and not to create it."

Railroad Comm. of Wisconsin v. C. B. & Q. et al., supra.

In the event the interpretation placed upon this proviso by counsel in their brief in support of petition, pp. 42, 43, were to be adopted, it would result in the absurd conclusion that after Congress has delegated to the Interstate Commerce Commission the comprehensive power to permit carriers to extend or abandon lines, to permit and require the consolidation of terminal facilities and the joint use of facilities, provide for the consolidation of the lines of interstate carriers into separate systems, to determine the percentage of return constituting a fair return upon the value of the carrier's property to permit the issuance of securities,

the power so confided to the Federal Commission should lie dormant and leave the states free to legislate directly or through the medium of commissions, relative to all of these matters until the Interstate Commerce Commission itself determined directly or by inference that a particular state statute should be superseded. Until the Interstate Commerce Commission had completed consolidation of the lines of the interstate carriers throughout the United States, had completely regulated their finances in all particulars, had fully acted in determining what extensions, abandonments and joint use of facilities should be permitted, at every point in the United States served by the lines of an interstate carrier, the state commissions, under petitioner's conception of the law, would be free to act, ordering the carriers to expend millions of dollars in these particulars and requiring them to enlarge and consolidate their terminal facilities in a manner which in all human probability would not conform to the final orders entered by the Federal Commission. It is so apparent that any such interpretation of the statute would result in endless confusion and great waste that to state the proposition is to affirm it. As was stated by the court in the case of *Shealy et al. v. Southern Ry. Co.*, supra:

> "The effect of the Transportation Act of 1920 is to limit the power of the states over interstate commerce to an exceedingly circumscribed sphere. They have control of purely

> internal affairs, but that control in so far as it affects interstate carriers must be exercised in a manner that does not project the will of the particular state into other states of the Union. Stone v. F. L. & T. Co., 116 U. S. 334."

In deciding the case of *Adams Epress Co. v. Croninger,* 226 U. S. 491, this court, in speaking of the proviso found in the Carmack Amendment, held:

> "But it has been argued that the non-exclusive character of this regulation is manifested by the proviso of the section, and that state legislation upon the same subject is not superseded, and that the holder of any such bill of lading may resort to any right of action against such a carrier conferred by existing state law. This view is untenable. It would result in the nullification of the regulation of a national subject and operate to maintain the confusion of the diverse regulation which it was the purpose of Congress to put an end to."

This rule is particularly applicable to the case at bar for the reason that in the event the construction for which petitioners contend were placed upon the proviso, paragraph 17 of Section 1, it would not only "result in the nullification of the regulation of a national subject and operate to maintain the confusion of the diverse regulations which it was the purpose of Congress to put an end to," but would "directly interfere with and burden interstate commerce to such an extent as to actually destroy it."

We cannot better express our views than to quote from the Wisconsin case, supra, page 588, where this court, speaking of the "specific proviso of the original Interstate Commerce Act, repeated in the amending acts, that the Commission is not to regulate traffic wholly within a state," held that:

> "Commerce is a unit and does not regard state lines, and, while under the Constitution, interstate and intrastate commerce are ordinarily subject to regulation by different sovereignties, yet, when they are so mingled together that the supreme authority, the Nation, cannot exercise complete effective control over interstate commerce without incidental regulation of intrastate commerce, such incidental regulation is not an invasion of state authority or a violation of the proviso."

The Interstate Commerce Commission Has Taken Jurisdiction and Acted Respecting the Identical Subjects Embraced Within the California Commission's Orders.

Counsel for petitioner argue, original brief p. 33, that the "proviso found in paragraph 17 of Section 1 is in effect a Congressional enactment of the principle announced * * *" in the Larabee case, "namely, that, even when Congress has entered a particular field of interstate commerce and has authorized the Interstate Commerce Commission to exercise jurisdiction therein, nevertheless, unless the matter is to be handled by *general rule or regulation*, the states may continue to act as to particular situations until the Interstate Commis-

sion *takes action* as to such particular situations," thereby conceding that in the event the Interstate Commerce Commission has "taken action" upon the subject of the California Commission's orders the power of the State Commission is superseded and its orders have no efficacy.

If it were held that under the ruling of the Larabee case, or by virtue of the proviso found in Subdivision 17 of Section 1 of the act, the power of the California Railroad Commission to enter these orders continued until the Interstate Commerce Commission had "taken action" on the same subject matter, we find that the facts compel the conclusion that the state statute and powers sought to be exercised thereunder by the California Commission have nevertheless been superseded.

The Interstate Commerce Commission has actually "taken action" in issuing orders on the eighth day of July, 1921, after formal hearings "In the matter of applications under paragraphs 18 to 21, inclusive, Section 1, of the Interstate Commerce Act for certificate of public convenience and necessity for the construction or extension of lines of railroad, and applications under paragraph 18, Section 15a, of said act for permission to retain the excess earnings of newly constructed lines of railroad," and "In the matter of applications under paragraphs 18 to 21, inclusive, Section 1, of the

Interstate Commerce Act for certificate of public convenience and necessity authorizing the abandonment of lines of railroad or the operation thereof."

It, therefore, appears that "the matter is one to be handled by general rule or regulation * * *" and that "the Interstate Commerce Commission has taken action as to such particular situations * * *" referred to at page 3 of brief for petitions.

These orders entered by the Interstate Commerce Commission are binding upon the carriers and upon failure to comply therewith or to observe the provisions of the statute relating to extensions or abandonments, carriers engaged in interstate commerce would subject themselves to the imposition of the severe penalties prescribed by the act.

In the very cases under consideration, as is stated in the motions to advance, on file herein, "*the Interstate Commerce Commission is also confronted with the same question of jurisdiction which is now before this Honorable Court for final determination. After the decision by the Supreme Court of California, the City of Los Angeles filed a complaint before the Interstate Commerce Commission invoking its powers to order the erection, by the three railroads in question, of a union passenger depot in Los Angeles.*"

It may be added that since these motions to advance were filed the Interstate Commerce Commis-

sion in the case referred to in the motions, City of Los Angeles, Complainant, v. L. A. & S. L. R. R. Co. et al., Defendants, I. C. C. No. 14778, has acted upon the complaints filed therein and to which references were made in the motions, by conducting and concluding a formal hearing of the case, Commissioner Mr. Clyde B. Aitchison presiding, and wherein the California Railroad Commissioner, the petitioner now before this court, entered its appearance and participated in the proceedings, which involved precisely the *identical questions* that were presented to the Railroad Commission of the State of California in the cases now under review here.

The following authorities sustain the propriety of directing this court's attention at this time to the general orders entered by the Interstate Commerce Commission and to the action taken by that Commission in the case now pending before it, involving the identical questions determined by the California Commission in its decisions and orders, so as to avoid useless circuity of proceedings.

Dakota County v. Glidden, 113 U. S. 222;
Ridge v. Manker, 132 Fed. 599;
Kimball v. Kimball, 174 U. S. 158;
Gulf, etc. Ry. Co. v. Dennis, 224 U. S. 503.

ISSUES UNDECIDED BY THE SUPREME COURT OF THE STATE OF CALIFORNIA

We have argued that this court should only consider and undertake to decide the question determined by the Supreme Court of the State of California, which is the sole ground upon which petitioners have rested their petitions for writs of certiorari.

Nevertheless as counsel for petitioners have argued these other questions in their brief, we are moved by caution to incorporate an argument relating to them.

This Court May Examine the Entire Record, Including the Evidence, to Determine Whether Respondents' Constitutional Rights Claimed by Respondents Have Been Denied.

In the event that this court undertakes to determine the question whether the orders entered by the California Railroad Commission are unsupported by any evidence or are contrary to the evidence, it will be guided by the provisions of the California statute, relating to review of Commission's orders. Section 67 of the Public Utilities Act of California provides that, after the denial of an application for rehearing, "the applicant may apply to the Supreme Court of this state for a writ of certiorari or review * * * for the purpose of having the lawfulness of the original order or decision, or the order or de-

cision on rehearing, inquired into and determined * * *. The review shall not be extended further than to determine whether the Commission has regularly pursued its authority including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of the State of California."

In the leading case of *Pac. Tel. & Tel. Co. v. Eshelman,* 166 Cal. 640, 694, the Supreme Court of the State of California held:

> "This court has expressly held that the clause 'whether the tribunal has regularly pursued its authority' is the equivalent of 'whether it has exceeded its jurisdiction'."

In deciding the case of *Marin Water Co. v. Railroad Commission of the State of California,* 171 Cal. 706, 713, the California court held, in construing Section 67 of the Public Utilities Act:

> "There is also a provision excluding questions of fact from review. Notwithstanding this, however, the law remains that when a finding or conclusion of fact is based upon uncontradicted evidence its accuracy usually becomes a mere question of law and in that event the question may be reviewed if it goes to the jurisdiction * * *."

The California court affirmed this rule in deciding the case of *Allen v. Railroad Commission*, 179 Cal. 68, 74:

> "When the question, ever one of mixed law and fact, goes, as here, to the jurisdiction itself, * * * to say that the determination of the commission upon this matter is final and conclusive and is not subject to review, is the equivalent of denying to a petitioner a hearing upon a right carefully preserved to him by the language of Section 67 itself—a hearing and a determination of whether the order and decision under review 'violates any right of the petitioner under the constitution of the United States or of the state of California'." (Citing cases.)

Petitioners are not suggesting that the court review the evidence introduced before the Commission in these proceedings for the purpose of determining controverted questions of fact but are asking the court to review the evidence to determine whether respondents' contention is correct that there is *no* evidence to support the Commission's findings, decisions and orders, and whether there were "such arbitrary and capricious actions on the part of the Commission as to violate the due process clause of the Constitution."

This court has held that

> "While it is true that upon a writ of error to a state court we cannot review its decision upon pure questions of fact, but only upon questions of law bearing upon the Federal right set up by

the unsuccessful party, it equally is true that *we may examine the entire record,* including the evidence, if properly incorporated therein, to determine whether what purports to be a finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter."

Kansas City Southern Ry. v. Albers Comm. Co., 223 U. S. 573;

Washington ex rel O. R. & N. R. Co. v. Fairchild, 224 U. S. 510;

Florida E. C. R. Co. v. U. S. 234 U. S. 173;

I. C. C. v. At. & S. F. Ry. Co., 234 U. S. 293.

Counsel for petitioners argue, in their supplemental brief, pages 11 et seq., the questions whether "the Commission's findings on questions of public convenience and necessity were final and conclusive under the California law," and cite authorities of the Supreme Court of the State of California in support of the contention that such findings are conclusive. Petitioners, however, state on page 16 of their brief:

> "However, notwithstanding section 67 of the Public Utilities Act and its own prior decisions, the California court in the particular cases under review failed to follow the undoubted principle of law above set forth."

Then after quoting from the decision of the Supreme Court of the State of California rendered in this case, it is said on page 17 of the brief:

> "Thus, the state court has apparently rendered a decision contrary to those previously rendered and contrary to the principle followed by this honorable court. In this respect, we respectfully submit, the Supreme Court of California has erred."

Notwithstanding the previous decisions of the Supreme Court of the State of California, the decision rendered by it in the case at bar, construing the California statute, is controlling. No authorities need be cited in support of this elementary rule and that the construction placed upon the California statute by the highest court of that state is binding upon this court. The case of *N. Y. & Queens Gas Co. v. McCall*, 245 U. S. 345, cited by counsel for petitioners, on page 14 of their brief, supports this elementary rule.

The general rule may therefore be stated that this court will review the evidence, findings, decisions and orders of the California Commission to determine whether any of the rights of the respondents guaranteed by the Constitution of the United States have been impaired.

THE ORDERS OF THE CALIFORNIA COMMISSION VIOLATE THE DUE PROCESS CLAUSE OF THE CONSTITUTION BECAUSE THEY ARE ARBITRARY, NOT SUPPORTED BY ANY EVIDENCE, AND ARE CONTRARY TO THE EVIDENCE.

Any Power that the California Commission Might Lawfully have Exercised in Entering Its Orders Was a Limited Power and Could Not be Exercised Arbitrarily.

The immediate question for determination is whether there was substantial or any evidence, introduced before the Railroad State Commission, which supports its findings, decisions and orders.

> "The legal effect of evidence is a *question of law*. A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law and must in the language of the statute 'be set aside by a court of competent jurisdiction'."
>
> *L. & N. R. R. Co. v. I. C. C.*, 227 U. S. 88, 92;
> *I. C. C. v. Union Pacific R. Co.*, 222 U. S. 541;
> *Northern Pacific Ry. Co. v. I. C. C.*, 216 U. S. 538, 544.
>
> "The law remains that when a finding or conclusion of fact is based on uncontradicted evidence, its accuracy usually becomes a mere question of law, and in that event the question may be reviewed if it goes to the jurisdiction."
>
> *Marin Water Co. v. C. R. C.*, 171 Cal. 706, 713.

The Grounds Upon Which The California Commission Seeks To Support Its Orders.

The Commission seeks to support the orders entered by it upon two main grounds; viz.:

So far as the Atchison, Topeka & Santa Fe Railroad Company, and the Los Angeles & Salt Lake Railroad Company are concerned, by the finding, "present passenger facilities of the *Santa Fe* and *Salt Lake stations* are inadequate." (Commission's Order Trans. 80.)

"As to the *Southern Pacific* depot, its continued use does not conform to any satisfactory plan for the elimination of the grade crossings on Alameda Street." (Commission's Order Trans. 140.)

The map incorporated in the brief filed by petitioners for writ of certiorari graphically shows the location of the three steam roads, including their main lines entering Los Angeles and their passenger terminal and other facilities. The lines of the Santa Fe enter from the north and proceed along the westerly bank of the Los Angeles River, reaching the passenger terminal at about the center of the diagram, and extending thence southerly and across the Los Angeles River. The tracks of this road, shown on the diagram, form a portion of its main line over which interstate traffic, both freight and passenger, is transported from and to eastern

destinations and from and to San Diego and other points in Southern California. The line of the Los Angeles & Salt Lake Railroad Company extends in a general northerly and southerly direction along the east bank of the Los Angeles River, and likewise forms a portion of the main line of its road over which interstate traffic is moved from and to eastern destinations and points in Southern California. These lines are remote from the main line of the Southern Pacific Company, operated northerly and southerly along Alameda Street to and through its passenger terminal shown on the diagram, and over which interstate traffic, both freight and passenger, is handled to points located northerly, southerly, easterly and westerly from its passenger station. It therefore appears that the Santa Fe and Salt Lake lines are in nowise concerned with the operation of grade crossings, except those on either bank of the river, and that the Southern Pacific Company is in nowise concerned with the grade crossings other than those on Alameda Street.

The interests of the three steam lines involved in the Commission's order must necessarily be separately considered in order to determine whether their constitutional rights have been impaired.

The Commission's Orders Cannot Be Supported by Finding That the Station Buildings of the Santa Fe and Salt Lake Lines Are Inadequate in View of the Undisputed Fact That Their Passenger Terminal Facilities Are Otherwise Adequate.

PASSENGER FACILITIES OF ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

The *uncontradicted evidence* shows that the passenger terminal facilities of the Santa Fe are adequate not only to provide for its own immediate and *future* needs but are also adequate to accommodate the traffic of all the steam lines, operating into a Union Terminal, which might be erected upon and operated in connection with its existing passenger facilities. The chief engineer of the California Railroad Commission in a report made at the request of the Commission, C. R. C. Exhibit No. 1, at page 290 stated that "the present site of the Santa Fe station and freight yards on the west bank of the river between First and Sixth Streets also appeared to offer a suitable location for a union passenger terminal, and we have made studies to show what is possible in this location. * * * "

At pages 291 and 292 of C. R. C. Exhibit No. 1, the Commission sets forth the advantages of the

existing Santa Fe passenger terminal facilities for a union station:

> "Adequate space is provided for station tracks; economical operation is possible; connection to Pacific Electric lines to the east is possible,—these are lines of heaviest traffic; no grade crossings of railroads are introduced; no changes in streets are necessary; a through terminal is provided; least expense for viaducts and trackage is required; least new capital is required; loss of property values is small; least amount of land is required for railroad purposes; lands now held for railroad use could be released; open door is made for future roads entering Los Angeles; railroads would be confined to natural channel, the banks of the Los Angeles River; this station would automatically do away with all passenger operation on Alameda Street. * * * All of the project is on the ground, as far as the steam roads are concerned. The approaches are on good grades with little or no curvature and with maintenance less than for elevated structures. No streets are crossed at grade by main line tracks."

It is significant that there is no finding made by the Commission in either of its orders that the terminal facilities to the Atchison, Topeka & Santa Fe at Los Angeles are inadequate, the only finding being that the passenger station *building* itself is inadequate and unsatisfactory and as a matter fact no such finding could have been made in view of the *uncontradicted evidence* contained in the engineer-

ing report made by the Commission's engineers. (California Railroad Commission Exhibit No. 1,) to which reference has been made.

Respondents contend that as a *matter of law* under the *undisputed facts* and in the absence of a finding that the terminal facilities are inadequate, it is beyond the power of the Commission to order the Atchison, Topeka & Santa Fe to abandon its existing passenger terminal facilities possessing these great advantages, and join in the expenditure of $36,000,000 where, by the expenditure of approximately one-half million dollars a handsome, adequate, safe, convenient and commodious station building could be erected thereby rounding out and completing a passenger terminal adequate and convenient for the needs not only of its own lines but all other lines serving the City of Los Angeles and any future lines entering that city.

Passenger Facilities of Los Angeles & Salt Lake Railroad Company

The passenger station *building* of the Los Angeles & Salt Lake Railroad Company is confessedly inadequate but the uncontradicted evidence shows that this line owns sufficient property and that its facilities, with the exception of its *station building*, are adequate to handle all of its passenger business safely, expeditiously, and economically.

By an agreement executed between Southern Pacific Railroad Company and Los Angeles & Salt Lake Railroad Company on the 18th day of July, 1917, Southern Pacific-Salt Lake Exhibit No. 1 (Tr. p. 573) provision is made for the joint use of the existing Southern Pacific station building at Los Angeles by the Los Angeles & Salt Lake Line, which would provide the Salt Lake Line with a modern, commodious and convenient station of sufficient capacity to handle its entire passenger traffic for more than twenty years to come.

The Southern Pacific and Salt Lake Lines made application (Tr. p. 31) to the California Commission for permission to jointly use and operate the existing Southern Pacific station, prior to the time the Interstate Commerce Commission had been vested, by the recent amendments to the Interstate Commerce Act, with exclusive jurisdiction to grant such applications. This application, which would have afforded the Salt Lake Line a modern, convenient and safe passenger station, was denied by the Commission.

The Commission's Orders Violate the Due Process Clause of the Constitution in Requiring the Santa Fe and Salt Lake Lines to Join in the Expense of Providing a Union Passenger Terminal in Order that the Grade Crossings on Alameda Street May Be Eliminated.

It has already been shown that both the Santa Fe and the Salt Lake Lines own sufficient property and that their facilities are adequate to handle all of their passenger business at Los Angeles safely, expeditiously, and economically, with the exception of the passenger station buildings themselves; that by the expenditure of comparatively small sums of money modern, convenient, safe and commodious station buildings may be provided by each of these lines.

The Commission's orders are predicated primarily upon the finding that a Union Passenger Station is necessary in order to eliminate grade crossings on *Alameda Street*. (Tr. p. 144.)

The uncontradicted evidence of the Commission's engineering experts shows that, with the exception of the grade crossings along Alameda Street, all other crossings can be eliminated without establishing a Union Station, and that such a station would not facilitate the elimination of any of the river crossings, but that the elimination of these crossings would be made in precisely the same manner whether a Union Station was or was not established.

The Commission's orders compel the Santa Fe and Salt Lake Lines to join in the expense of erecting and maintaining a Union Passenger Station at the cost of millions of dollars solely for the reason that the petitioner believes that this will be an easy and ready way to remove the Southern Pacific Company's trains from *Alameda Street*, over which the Santa Fe and Salt Lake Lines have no right to operate and never have and do not now operate any of their trains.

The Commission's orders are not supported by the finding that the existing passenger station *buildings* of the Santa Fe and Salt Lake lines are inadequate for the reason that the *uncontradicted* evidence shows that the passenger station facilities of these lines, with the exception of the buildings themselves, are fully adequate to meet the public requirements. Under these facts the California Commission only has the power to compel these carriers to erect suitable structures at their present sites.

Therefore, the necessary force and effect of the orders is to require the Santa Fe and Salt Lake Lines to incur an expense of millions of dollars so that their rival, the Southern Pacific Company, may eliminate grade crossings, exclusively used in the operation of its trains; and the Santa Fe and Salt Lake Companies are to that extent deprived of their property without due process of law, denied the

equal protection of the law, and their property is taken for public use without compensation, in contravention of and repugnant to provisions of the Constitution of the State of California and of the Fourteenth Amendment to the Constitution of the United States.

The Existing Passenger Terminal Facilities of the Southern Pacific Company Are Fully Adequate to Serve the Public Convenience and Necessity and to Safeguard the Interests of the Traveling Public and its Employees and the Commission's Orders, Requiring the Southern Pacific Company to Join in the Expense of Erecting a Union Passenger Terminal, Violate the Constitutional Rights of That Company.

It is significant that there is no finding, conclusion or order to the effect that the existing passenger facilities of the Southern Pacific Company, at Los Angeles, are in any wise inadequate or insufficient to promote the security, convenience, or necessity of the public. Such a finding or conclusion could not have been made or reached, for the reason that the *uncontradicted evidence* proves conclusively that the existing passenger terminal facilities of the Southern Pacific Company are modern, commodious, convenient, safe and adequate to accommodate all passenger trains, not only of the Southern Pacific Company but of the Salt Lake and Santa Fe companies as well for a period of at least the next twenty years. The passenger terminal of the South-

ern Pacific Company was, after formal hearing, constructed in 1915 under an express order of the Railroad Commission of the State of California, which was predicated upon the finding that "the structure to be erected under these plans will be efficient and ample to provide for the probable passenger traffic coming to and departing from a city several times the present size of Los Angeles." *In re Application Southern Pacific Company*, 3 C. R. C. 927, 929. (Order set forth in Appendix.)

The Commission's engineer testified in the present proceedings that: "The present station is well designed and is adequate and suitable for its purpose, * * * " that the "site is large enough for some time to come and is sufficient for 140 trains in the future, * * * being based on a twenty year esitmate." The evidence further shows without conflict that the present station facilities of Southern Pacific Company are modern, convenient and are adequate to provide for the convenience of the public for a period of twenty years, making allowances for all possible future "increase of traffic." (C. R. C. Exhibit No. 1, pp. 235, 337.)

Exhibits Nos. 8 (a) to 8 (i), inclusive, introduced by Southern Pacific and Salt Lake companies, are the drawings of the plans and specifications of the present station, showing the complete depot and track lay-out, size of rooms, elevations, etc., and bear out the testimony of the engi-

neers of the California Railroad Commission set forth in California Railroad Commission Exhibit No. 1, page 235, that "*the present station is well designed and is adequate and suitable for its purpose.*"

The Commission's engineers further testified that the existing Southern Pacific station, including the depot itself, and track lay-out, "is large enough for some time to come," and that "it is sufficient for 150 trains in the future * * * being based on a twenty year estimate." This evidence *given by the engineers of the California Railroad Commission* is not only uncontradicted but is fully corroborated by the testimony of the executive and operating officials of the carriers.

The testimony of Mr. T. H. Williams, Assistant General Manager Southern Pacific Company (Tr. 474-6), and Mr. W. H. Comstock, General Manager of the Los Angeles & Salt Lake Line (Tr. 485-9, and S. P. & S. L. Exhibits 29 and 30) is uncontradicted and supports the unqualified statement hereinbefore made that the existing passenger terminal facilities of Southern Pacific Company are fully adequate to meet the requirements not only of the Southern Pacific Company but of all the steam lines operating into Los Angeles at the present time and to provide facilities for any anticipated increase in traffic which may occur within the next twenty years.

"Among the principal advantages of the site of the present Southern Pacific station for a union terminal * * *" set forth by the commission's technical engineering experts at page 284 of California Railroad Commission's Exhibit No. 1, are:

> "It is possible to provide a union L. C. L. freight station at the Santa Fe site, which is the best site available for this purpose."
>
> "It is possible to segregate passengers and freight on different sides of the river."
>
> "It is convenient to business, hotel and shopping districts."
>
> "Use is made of present facilities, cost of which is already paid."
>
> "Elimination of all grade crossings on Seventh, San Pedro and Aliso Streets for through Pacific Electric trains is provided for."
>
> "Pacific Electric traffic south of Los Angeles is given access to the union station."
>
> "Loss of property values is small, if there is any."
>
> "Passengers are not obliged to pass through industrial district but are carried over it."
>
> "The Southern Pacific site has a number of advantages, of which possibly the most important is the fact that it makes use of existing facilities whose cost is already paid for. * * * Our estimate of the present market value of the land is approximately $1,310,348.00 and of all Southern Pacific holdings in this block, $2,101,128.00."

See also testimony of Mr. Shoup (Tr. pp. 490-534).

In the light of this *uncontradicted evidence* the Commission could not lawfully have made a finding to the effect that the passenger terminal facilities of the Southern Pacific Company at the City of Los Angeles are inadequate to serve the public convenience and necessity.

It, therefore, can not be held, under the uncontradicted evidence, that the entire passenger terminal facilities of the Southern Pacific Company are at all improper, inadequate or insufficient to promote the security, convenience, and necessity of the public. It must, therefore, be held that the Commission had no jurisdiction to render its decisions and make the orders complained of, and that the orders must be declared void and set aside.

Louisville & Nashville Railroad Co. v. I. C. C., 227 U. S. 88, 93;

Interstate Commerce Commission v. Northern Pacific Railway Company, 216 U. S. 538, 544.

The Supreme Court of the United States has definitely set this question at rest in the case of *O. R. & N. Co. v. Fairchild*, 224 U. S. 510, where it sustained the contentions of the carriers involved in that proceeding that the Railroad Commission of the State of Oregon had no jurisdiction, power, or authority to order an extension of facilities because the evidence did not show, and the Commission

could not therefore find as a jurisdictional prerequisite, that public convenience and necessity required that the extensions be made.

The Commission's Orders Requiring the Southern Pacific Company to Join in the Expense of Erecting and Operating a Union Terminal Depot Remote From Its Present Passenger Terminal Can Not Be Sustained, Upon the Ground That Its Existing Facilities Do Not Conform to the Commission's Plan For Eliminating Grade Crossings.

It must be borne in mind that all of the carriers have consistently conceded the necessity of eliminating grade crossings in the city of Los Angeles, the Santa Fe and Salt Lake lines, where they cross grades along the westerly and easterly banks of the Los Angeles River, and the Southern Pacific Company, where its main line traverses Alameda Street.

The court's attention is further directed to the fact that the evidence does not show that it is necessary to provide a unified passenger terminal in order to eliminate grade crossings.

The chief engineer of the California Railroad Commission testified that plans for the elimination of the so-called river crossings (in which the Salt Lake and Santa Fe lines are alone interested) may be eliminated irrespective of where a union depot may be located (Tran. 432). The fact, therefore, appears that these river grade crossings may be

eliminated under present conditions irrespective of whether a union passenger terminal is established (Tr. 451).

The *uncontradicted evidence* given by both the Commission's and carriers' engineers shows that all the grade crossings where the Santa Fe or Salt Lake lines are involved may be eliminated without establishing a union station. And, further, that all these grade crossings would receive the same treatment in the elimination thereof whether any union passenger station were established or not.

Complete grade eliminations along Alameda Street may also be accomplished without the necessity of establishing a union passenger station. The *uncontradicted evidence* of the carriers' engineers shows that the final and ultimate plan, outlined by the carriers, by the agreement attached to the application made by the Southern Pacific and Salt Lake lines, for permission to establish a union depot at the present site of the Southern Pacific station, filed prior to the adoption of the amendments of 1920, would reduce the number of grade crossing movements from 89 on the Salt Lake, 306 on the Santa Fe, 1408 on the Southern Pacific, and 22,950 on the Pacific Electric daily at the present time, or a total of 24,753, to absolutely zero (Tran. 329, 340). The 22,950 grade crossing movements made by Pacific Electric trains daily at the present time,

would not be eliminated, if the Commission's orders were carried into effect but would be entirely eliminated under the carriers' plans.

The Commission has made no finding and has reached no conclusion that a union passenger terminal is necessary in Los Angeles for any other purpose than to enable an order to be entered eliminating grade crossings; in fact, the Commission states, in its original order:

> "The principal arguments against the establishment of a union station are:
>
> "(1) Los Angeles is not a through station. Practically all trains entering the city terminate there, and it is there that the majority of the passengers reach their destination. Only approximately 15 per cent. of the total number of passengers transfer from one station to another.
>
> "(2) The first cost of any adequate union passenger terminal will be high and the saving in operating expenses will not alone warrant the resulting increase in fixed charges."

It may be remarked that the approximation of 15% of through passengers made by the Commission is the highest approximation made; the carriers' evidence showing that a careful check disclosed only twelve out of every ten thousand passengers would avail themselves of facilities afforded by a union station (Trans. 351).

It must be held that any finding made by the Commission that public convenience and necessity requires the erection of a union station at the city of Los Angeles is wholly unsupported by the evidence, and that the attempt of the Commission to justify its orders upon the grounds merely that the passenger station buildings of the Santa Fe and Salt Lake lines are inadequate to serve the public convenience and necessity, and that the existing depot of the Southern Pacific Company * * * does not conform to the plan for the elimination of said dangerous grade crossing * * * cannot avail.

The Supreme Court of the State of California, as has hereinbefore been suggested, said "there is no merit in this contention * * * that the establishment of a union terminal depot was an indispensable element in accomplishing the elimination of such grade crossings * * * and that * * * we can conceive of no indispensable relation between the elimination of grade crossings and the establishment of a union depot facilities" (Tr. 233).

This rule announced by the Supreme Court of the State of California, in construing the state statute, under the facts of this case, is, under the elementary rules and authorities, to which we have adverted, controlling upon this court.

Counsel for petitioners in their supplemental brief, page 18, cite the case of *Erie Railroad v.*

Board of Public Utility Commissioners, 254 U. S. 394, in support of the contention there made that the power of the state is supreme to protect the public in its use of streets, where such power conflicts with the operation of interstate carriers.

This case is not pertinent for the reason that the carriers are not resisting the elimination of grade crossings, and because, as above suggested, the Supreme Court of the State of California has expressly held in this case, construing the state statutes, that there is no indispensable relation between the elimination of grade crossings and the establishment of a union depot.

The Commission's orders are, therefore, shown to be repugnant to the provisions of the Fourteenth Amendment of the Constitution of the United States and must be held to be void.

THE DECISIONS AND ORDERS COMPLAINED OF TAKE THE PROPERTY OF RESPONDENTS FOR PUBLIC USE WITHOUT COMPENSATION AND DEPRIVE THEM OF THE PROPERTY WITHOUT DUE PROCESS OF LAW AND DENY RESPONDENTS THE EQUAL PROTECTION OF THE LAW IN CONTRAVENTION OF THE PROVISIONS OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

We have already referred to the evidence introduced before the Commission by both the engineers of the California Railroad Commission and the executive, operating and engineering officials of the carriers relating to the adequacy of the passenger terminal facilities of the three steam lines involved in the order.

The Commission's decisions and orders require the carriers to abandon large areas of terminal land acquired for the express purpose of handling the traffic in the City of Los Angeles, to "destroy and scrap facilities" of a value of several millions of dollars, to permit the joint use of facilities by rival carriers, *but no provision is made in the decisions and orders for reimbursement to any of the petitioners for the inevitable losses which they will sustain by scrapping their facilities, devoting their lands and facilities to the partial use of their rivals or for the loss of property values which they will inevitably sustain.*

The question for immediate determination is whether the Commission may in the face of the *uncontradicted evidence* to which we have referred "subject the property devoted by its owners to a public use, to another public use, or to the same public use by its rivals * * *" without first making compensation for the loss of properties abandoned and scrapped, and for the use of such properties as may be jointly used by rival carriers.

Irrespective of the limitations placed upon the power granted to the Commission by the Public Utilities Act, especially section 41 thereof, which expressly provides that where after a hearing the Commission finds that public convenience and necessity requires the use by one public utility of the tracks or other equipment or any part thereof belonging to another public utility, the Commission shall provide "prior to such use a fair and just compensation for damages suffered," the Fourteenth Amendment to the Constitution of the United States guarantees to each of these petitioners the right to have compensation made to them before property or facilities owned by them are required to be scrapped, abandoned or devoted to the use of present and prospective rivals.

> *Pacific Telephone & Telegraph Co. v. Eshelman*, 166 Cal. 640, 662-3.

Likewise, the constitutional rights of a utility are impaired when under the facts of a case such as this, it is shown that the existing facilities of a utility are adequate to fully meet its statutory and common law obligations to the public and its employees, an order is entered requiring the utility to expend millions of dollars to provide a "monumental gateway" to satisfy the "civic pride * * * in a tourist center * * *."

O. R. & N. Co. v. Fairchild, 224 U. S. 510.

In considering "the desirability of a union passenger terminal" it is said at page 247 of the California Railroad Commission Exhibit No. 1, that:

> "A railroad passenger terminal is essentially a city matter; it is the main entrance to, and the main exit from, every important city. City pride and what might be called the advertising aspect of a fitting city entrance are, therefore, essential factors in the consideration of any important passenger terminal."

The Commission's experts supported the respondents' contention by reciting in their report immediately following the foregoing quoted paragraph that,

> "In not a single instance of monumental passenger terminal construction in recent years can it be said that the cost of the station, considered from the railroad operating viewpoint alone, is justifiable as a sustaining investment."

Mr. Sachse further testified that:

> "I did not say in my report, and I am not by any means of the opinion, never was and never will be that this thing (Union Passenger Terminal) is desirable if the city bears the cost * * *" (Trans. 436).

"I am still of the opinion" (expressed in C. R. C. Exhibit No. 1, at page 247), that: "In not a single instance of monumental passenger terminal construction in recent years can it be said that the cost of the station, considered from the railroad operating viewpoint alone, is justified as a sustaining investment" (Tr. 433).

During the course of the hearing the Commission plainly indicated that the carriers would be required to bear the entire cost of erecting this "monumental gateway" which, according to the revised estimate of the Engineering Conference, set forth in the table (Tr. 94) ranges from $25,396,633 to $45,092,104.

At page 454 of C. R. C. Exhibit No. 1, it is said:

> "*The establishment of a union passenger terminal as recommended by us will be serious in its effect on the Southern Pacific.* The site of the depot yard cutting across Alameda Street, as it does, isolates the present less-than-carload freight station, and the establishment of a coach yard at the site of the present

> Southern Pacific main freight yard will force the construction of a new yard. * * * The construction of a connecting track between the depot yard of the union passenger station and the proposed site of the coach yard will make it impossible to handle the cars in and out of the freight station and will necessitate moving the freight station elsewhere."

The Commission's expert testified that it was absolutely essential that this existing facility of the Southern Pacific Company be abandoned by that line in order that it might be used as a coach yard by all carriers entering and using the proposed Plaza union depot. Yet no *provision is made in the Commissions decisions and orders providing for compensation to be paid the Southern Pacific Company for the loss of this facility or for the joint use of this facility by its rivals.*

This statement is true with reference to the many facilities now owned and operated by respondents at their passenger terminals at Los Angeles. The Commission's decisions and orders provide for the abandonment of large areas of their terminals, the scrapping of facilities erected at a cost of millions of dollars and the joint use of portions of their remaining facilities by rival carriers, without any provision being made to compensate respondents for the direct losses which they will sustain, or for the amounts they are entitled to receive by virtue of their constitutional and statutory rights for per-

mitting rival lines to use their facilities. The Commission's decisions and orders, therefore, requiring the abandonment of these properties without making provision for compensation to respondents, and in requiring respondents to join in the expense of erecting another passenger station and additional terminal facilities in the City of Los Angeles, are unreasonable, arbitrary and unlawful because they transgress the constitutional provisions against taking private property for public use without compensation. The power sought to be exercised goes not merely to the regulation of respondents and their business but passes beyond proper regulation and amounts to a taking of the property of respondents and the orders are therefore referable not to the police power, but to the power of eminent domain.

Irrespective of public convenience or public necessity, there is no justification for the taking of respondents' property for the purposes proposed and depriving respondents of the use thereof without having first made provision for, and making payment to respondents of, adequate compensation.

Pac. Telephone & Telegraph Co. v. Eshelman, 166 Cal. 640, 662-3;

O. R. & N. Co. v. Fairchild, 224 U. S. 510.

In deciding the case of *Pacific Telephone & Telegraph Co. v. Eshelman*, supra (page 663), the California court held that there were certain fundamental principles which govern and that

> "The first of these is that this (police) power goes merely to the *regulation* of the public utility, and that when an order passes beyond proper regulation it amounts to a taking of the property and the order is then referable not to the police power but to the power of eminent domain * * *. Nor is it of consequence that the law or order be in terms and in form regulatory, if, in effect, it is a taking of property or a deprivation of the use of property within the meaning of the Constitution. No public convenience, no public necessity, however urgent, will justify such a taking."

The Court further held (page 664):

> "Another principle, quite as important and quite as fundamental, is that 'taking' of property within the meaning of the Constitution is not restricted to a mere change of physical possession, but includes a permanent or temporary deprivation of the owner of its use."

The court further announced the principle that the inferiority of service (although no such inference or assumption or conclusion can be reached under the facts of this case) actually rendered is not, of course, a justification for the taking of property and that "no necessity, however urgent, justifies a taking of property without compensation." (*Pac. Tel. & Tel. Co. v. Eshelman*, 166 Cal. 668-669.)

In the light of this decision and especially in view of the fact that the evidence before the Commission did not show or prove that the existing facilities of respondents are inadequate to fully serve the convenience of the public and to fully provide for the safety of the public and the employees of petitioners, it must be held that the Commission has not regularly pursued its authority and has exceeded its powers, that its orders are not properly referable to the police powers but to the powers of eminent domain and that in attempting to provide a "monumental gateway" possessing unusual "aesthetic possibilities" to satisfy the "civic pride" of this great "tourist city" the Commission has entered decisions and orders which are repugnant to and in contravention of the Fourteenth Amendment to the Constitution of the United States, and which deny respondents the equal protection of the law and deprive each of them of their property without due process of law and that the decisions and orders should be vacated, annulled and set aside.

The cases, by the courts of other states, cited by petitioners' counsel in opposition to this contention are easily distinguishable under the facts of those particular cases, and because of the different provisions found in the statutes of those states.

In the case of *Railroad Commission v. North Alabama Ry.*, cited at page 21 of petitioners' brief, as is shown by the excerpt, "the railroad may lose the

use of the old building or the use of the lot as a location for its passenger depot." Here the Southern Pacific Company will lose a depot, built under the order of the California Railroad Commission, and which the uncontradicted evidence shows, there being no finding to the contrary, is modern, convenient and adequate to serve the needs of the public.

The statute upon which the Commission rested its decision in the case of *Railroad Commission v. Ala. Gt. So. Ry. Co.*, reviewed by counsel in their brief, expressly repuired the railroad company to join in the use of union passenger stations. There is no such provision in the California law; in fact, "union depots are not mentioned therein."

The same observation may be made with reference to the cases of *State of Texas v. St. L. & So. W. Ry.* and *Dewey v. At. Coast Line Ry.*, cited upon page 22 of their brief.

The facts of the cases of *Gulf & S. F. Ry. Co. v. State*, and *Mayor, etc., of Worcester v. Norwich, etc., Ry.*, are essentially different from the facts in the case at bar.

Many state cases might be cited in opposition to those upon which counsel for petitioner relies, but we may rest content by referring the court to the case of *State ex rel. Wabash Ry. Co. v. Public Service Commission*, 271 Mo. Rep. 155, in which

it was held that where the evidence before the Commission does not tend to prove any defect or inadequacy in the present passenger depot, which cannot be corrected by repairs, improvement or enlargement, an order of the Commission, requiring the railroad company to erect a new depot in a new place, is unreasonable.

The Commission's Decisions and Orders Are in Contravention of and Repugnant to the Provisions of Section 10 of Article 1 of the Constitution of the United States by Reason of the Fact that These Decisions and Orders Will, if Made Effective, Impair the Contract Made Between the State of California and Southern Pacific Railroad Company, and the Contract Made and Entered Into Between the City of Los Angeles and Southern Pacific Railroad Company, Granting a Franchise Authorizing the Construction and Operation of Its Railroad on and Along Alameda Street in the City of Los Angeles.

The State of California has heretofore, as is shown by the record made before the Commission, entered into a contract with the Southern Pacific Railroad Company, the lessor of Southern Pacific Company, whereby it was granted the right to construct and operate its line of railroad from San Francisco to and through the City of Los Angeles, this line having heretofore been constructed and now being operated in the City of Los Angeles along Alameda Street and other streets.

This contract is evidenced by the grant made by the State of California to the Southern Pacific Company, the grant having heretofore been accepted by the Southern Pacific Railroad Company by filing its articles of incorporation and constructing its railroad commencing in the city and county of San Francisco, State of California, and running through the City of Los Angeles to San Pedro, and from, in and through the City of Los Angeles to the Colorado River, and other places in the State of California.

Likewise, the City of Los Angeles has, under the laws of the State of California and the charter of the City of Los Angeles, heretofore granted to Southern Pacific Railroad Company, the predecessor in interest of Southern Pacific Railroad Company, the lessor of Southern Pacific Company, by ordinance a franchise to construct, maintain and operate its railroad along Alameda Street in the City of Los Angeles, and the grant has been heretofore accepted by the Southern Pacific Railroad Company by constructing and operating, directly or through its lessee Southern Pacific Company, its railroad commencing in the City and County of San Francisco and running thence to and through the City of Los Angeles to the City of San Pedro, and from, in and through the City of Los Angeles to the Colorado River and other places in the State of California.

Paragraph 14 of the final order entered by the Commission (Tr. 150, 151) provides:

> "That upon the completion of the union passenger terminal, as required by this order, the defendant, Southern Pacific Company, shall discontinue the operation of trains on Alameda Street, between College Street and Fifteenth Street, inclusive, in the City of Los Angeles, except for the purpose of local freight switching, which may be carried on during limited hours to be hereafter fixed by supplemental order."

The order denies Southern Pacific Company and Southern Pacific Railroad Company the right to continue the operation of their trains along Alameda Street in the City of Los Angeles, except for the purpose of industrial switching, and if this order becomes effective the contract between the State of California and these petitioners and the contract between the City of Los Angeles and these petitioners, granting petitioners the franchises and right of operating its main line trains over this street, will be impaired and abrogated and these respondents will be deprived of these rights in violation of Section 10 of Article I of the Constitution of the United States and their property will be taken for public use without compensation, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

California State Telegraph Co. v. Alta Telegraph Co., 22 Cal. 398, 422-3;

New Orleans Water Works Co. v. Rivers, 115 U. S. 674;

Tammany Water Works v. N. O. Water Works, 120 U. S. 64, 67;

City of St. Louis v. W. U. Tel. Co., 63 Fed. 68, 70;

New York Electric Lines v. Empire City Subway, 235 U. S. 179, 192-3;

Russel v. Sebastian, 233, U. S. 195, 204;

Baltimore, etc. Co. v. Baltimore, 64 Fed. 153, 159-60;

Pacific Telephone & Telegraph Co. v. Eshelman, 166 Cal. 640.

The case of the *Denver & Rio Grande v. Denver*, 250 U. S. 242, cited by petitioner's counsel in opposition to this contention is not, as contended by counsel, "squarely in point."

In that case a carrier had merely been directed to abandon a small portion of a spur track; whereas in this case the Southern Pacific Company is required to abandon three miles of its main line used largely for the handling of interstate traffic.

CONCLUSION.

It is submitted that this court should only review the question actually decided by the State Court but that in the event the court concludes that it should review other questions than those decided by the State Court it should hold that the orders entered by the Railroad Commission of the State of California violate respondents' constitutional rights for the reasons, among others:

That there was no evidence before the Commission to sustain the finding that the passenger station facilities of respondents are inadequate or that the security or convenience of the public or respondent's employees necessitate such consolidation, abandonment or extension of facilities, or construction of such a union passenger terminal, but that, on the contrary, the *uncontradicted evidence* proves that the existing passenger terminal facilities of respondents at Los Angeles and the consolidation of facilities of the Southern Pacific Company and Salt Lake Line proposed by these respondents provide modern, commodious, adequate and safe facilities to accommodate all passenger traffic which may be carried by the respondents for at least the next twenty years.

That the decisions and orders complained of deprive respondents of their property without due process of law and take their property for public

use without compensation, in contravention of and repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States for the reason that no provision is made to pay to the respondents compensation for the loss of the facilities which must be necessarily abandoned, or for the use by their rivals of such facilities as may be required under the plan which the Commission orders the carriers to put into effect.

That the requirements of the orders compelling the Atchison, Topeka & Santa Fe and Los Angeles & Salt Lake lines to join in the expense of erecting and maintaining a union passenger terminal in order to effect the elimination of the grade crossings on Alameda Street over which these respondents have no right to operate and never have operated any of their trains deprive these respondents of their property without due process of law and deny them the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

That the requirements of the orders, compelling the Southern Pacific Company and Southern Pacific Railroad Company to join in the expense of erecting and maintaining a union passenger terminal for the reason that the existing depot of these respondents does not conform to the plan for the elimination of grade crossings in the City of Los

Angeles, will deprive these respondents of their property without due process of law and deprive them of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

That likewise Southern Pacific Company and Southern Pacific Railroad Company will necessarily be deprived of valuable franchise rights and privileges by being compelled to discontinue the operation of trains along Alameda Street in the City of Los Angeles, and that the decisions and orders of the Commission are in these particulars in contravention of and repugnant to the provisions of Section 10 of Article I of the Constitution of the United States, and by reason of failure of the Commission to make provision for payment to Southern Pacific Company and Southern Pacific Railroad Company of compensation for the loss of these valuable franchise rights the Commission's decisions and orders are in contravention of and repugnant to the provisions of the Fourteenth Amendment of the Constitution of the United States.

It is further submitted that in reviewing the question decided by the Supreme Court of the State of California this court should hold:

That the laws of the State of California under which the Railroad Commission of that state proceeded are in contravention of and repugnant to the provisions of Section 8 of Article I of the Constitution of the United States for the reason that the sole and exclusive power to enter orders such as were entered by the California Commission has been vested in the Interstate Commerce Commission by the amendments made to the Interstate Commerce Act in 1920, and that these amendments have divested the California Commission of jurisdiction to render or enforce the decisions and orders of which complaint is made.

That the orders of the California Commission directly interfere with and burden interstate commerce in violation of the commerce clause of the Federal Constitution.

Finally, that the history of Congressional legislation enacted pursuant to the commerce clause of the Federal Constitution regulating the rights and practices of interstate carriers shows that the Congress, because of the growth and development of the national commerce, has found it necessary in "unequivocal language" to declare a natjonal railroad policy and has enacted amendments to the Interstate Commerce Act, covering every detail of the subject so completely and in such a manner as to manifest its intention to exercise its constitu-

tional authority "in order to maintain an adequate railroad service for the people of the United States."

The wisdom of this Congressional policy is forcefully exemplified in the instant case.

The mandate of the amended Federal statute requiring the Commission to establish and adjust rates of interstate carriers as a whole, or in groups or territories, so that such carriers *shall* earn a "net railway operating income, equal as nearly as may be, to a fair return upon the aggregate value of the railway property * * *," and Section 5 of the amended act requiring the Commission as soon as practicable to "prepare and adopt a plan for the consolidation of the railway properties of the continental United States into a limited number of systems" (which the Interstate Commerce Commission has under consideration at the present time), and the other provisions of the amended statute providing for the comprehensive regulation of interstate carriers, would be nullified and the Interstate Commerce Commission would be rendered impotent to discharge these duties in the event the forty-eight state commissions retained jurisdiction or were held to possess concurrent jurisdiction with the Interstate Commerce Commission to require interstate carriers to abandon facili-

ties, extend their lines, and consolidate their terminal facilities at the principal cities in the several states.

Unless it be held in conformity with the decisions of this court that the jurisdiction of the State Commission to order carriers "subject to the jurisdiction of the Interstate Commerce Commission" to extend and abandon their lines and consolidate their terminal facilities and operate such facilities jointly, has been subordinated to the jurisdiction of the Federal Commission the inevitable result would be not only financial ruin to the carriers but carriers would be unable financially to provide adequate facilities for properly handling the nation's traffic. It is apparent that the amendments to the Interstate Commerce Act were adopted because Congress in accordance with its consistent policy recognized the necessity for the essential unity of the physical, economical and financial questions relating to the business of the interstate carriers, and the necessity of protecting railroad credit not only by providing reasonable rates of return but also by the actual control of capital expenditures and the desirability of securing the advantages of the unified operation of railroads and the minimum loss by competition, with due regard to the cost of service and the financial ability of the carriers concerned, and has enlarged the powers

of the Commission by vesting the Commission with authority to order the joint use of terminals, the making of extensions, and the abandonment of the lines and facilities of interstate carriers so that the Commission may promptly discharge the Congressional mandate of consolidating existing railroads and of protecting interstate commerce from being unduly burdened by the action of state authorities.

Concurrent exercise of such power and jurisdiction by the Federal and state commissions would result in conflicting orders and would seriously, if not entirely, operate to nullify the Federal policy which the Interstate Commerce Commission is empowered and directed to carry into effect.

> "It is unnecessary to repeat what has frequently been said by this court with respect to the complete and paramount character of the power confided to Congress to regulate commerce among the several states. It is of the essence of this power that, where it exists, it dominates. Interstate trade was not left to be destroyed or impeded by the rivalries of local governments."
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> *Houston E. & W. Texas R. Co. v. U. S.*, supra.

By undertaking to usurp the jurisdiction now vested exclusively in the Interstate Commerce Commission and by entering orders which directly bur-

den interstate commerce the Railroad Commission of California has entered orders repugnant to and in contravention of the provisions of Section 8 of Article I of the Constitution of the United States.

And it is respectfully submitted that the judgment of the Supreme Court of the State of California should be affirmed and the writs dismissed.

Respectfully submitted,

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